Supreme Court, U.S.
FILED

031190 FEB 18 2004

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

EDGAR D. McCLURE,
Petitioner,

vs.

HARRY E. WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, PENNSYLVANIA, and THE DISTRICT ATTORNEY OF THE COUNTY OF CARBON, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

JAMES R. HANKLE
(*Counsel of Record*)

SHERRARD, GERMAN & KELLY, P.C.
ATTORNEYS AT LAW
28th Floor, Two PNC Plaza
620 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 355-0200
FAX: (412) 261-6221

QUESTION PRESENTED

I. Whether Petitioner was denied effective assistance of counsel in derogation of his Sixth Amendment rights.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE PETITION 5
I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT 5
CONCLUSION 12
APPENDIX 1a–166a

TABLE OF AUTHORITIES

Bell v. Cone, 535 U.S. 685 2002) 9

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992) 10

Commonwealth v. Bazabe, 590 A.2d 1298 (Pa.Super. 1991) 8

Commonwealth v. Breisch, 719 A.2d 352 (Pa.Super. 1998) 8, 11

Commonwealth v. Holloway, 572 A.2d 687 (Pa.1990) 9

Commonwealth v. Mancini, 490 A.2d 1377 (Pa.Super. 1985) 9

Commonwealth v. Martin, 499 A.2d 344 (Pa.Super. 1985) 10

Commonwealth v. Neal, 618 A.2d 438 (Pa.Super. 1992) 8, 9, 11

Dickerson v. Vaughn, et al, 90 F.3d 87 (3rd Cir. 1996) 7

Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991) 7

Strickland, et al v. Washington, 466 U.S. 668 (1984) 8, 9, 12

U.S. v. Marzgliano, 588 F.2d 395 (3rd Cir. 1978) 8

U.S. v. Valenciano, 495 F.2d 585 (3rd Cir. 1974) 8

Zilich v. Reid, 36 F.3d 317 (3rd Cir. 1994) 7

UNITED STATES CONSTITUTION

Sixth Amendment (Assistance of Counsel)..... 1, 2, 3, 5, 6, 7, 8, 9, 10, 11

FEDERAL STATUTE

28 U.S.C. §1254(1)..... 1

STATE STATUTE

42 Pa.C.S.A. §5918 (1982)..... 9, 10

OTHER AUTHORITIES

Pa.R.E. 404..... 5, 10
Pa.R.E. 608..... 5
Pa.R.E. 609..... 5

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Eastern District of Pennsylvania and Third Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Third Circuit Court of Appeals is unreported and reproduced in the Appendix; the Order of the Eastern District of Pennsylvania is unreported and reproduced in the Appendix; the Magistrate's Response to Objections is unreported and reproduced in the Appendix; the Magistrate's Report and Recommendation is unreported and reproduced in the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

DATE OF JUDGMENT OR ORDER SOUGHT TO BE REVIEWED

November 21, 2003.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, OR REGULATIONS INVOLVED IN THE CASE

Sixth Amendment (Assistance of Counsel)

STATEMENT OF THE CASE

Petitioner's Appeal of a denial of a Habeas Corpus Petition arises out of the conviction of Petitioner in the Court of Common Pleas of Carbon County, Pennsylvania. Petitioner was represented during his trial by attorneys Michael Garfield and Robert Yurchak. After only a three hour jury trial on June 9, 1998, Petitioner was found guilty of five counts of Rape, five counts of Statutory Rape, four counts of Involuntary Deviate Sexual Intercourse, nineteen counts of Indecent Assault, two counts of Corruptions of Minors, and two counts of Criminal Conspiracy.

Immediately following his conviction, Petitioner retained new counsel and post verdict motions were filed raising, *inter alia*, Petitioner's contention that he received ineffective assistance of counsel during his trial. Specifically, Petitioner asserted that trial counsel's failure to put Petitioner on the witness stand to testify in his own defense, a decision resulting directly from counsel's error of law, constituted ineffective assistance of counsel. The post verdict motions were ultimately denied by the trial court, and Petitioner was sentenced to a prison term of nineteen to thirty-eight years.

Petitioner appealed the denial of the post trial motions to the Superior Court of Pennsylvania, again raising and briefing his assertions that he had received ineffective assistance of counsel during his trial. The Superior Court adopted the trial court opinion and affirmed on that basis. Petitioner subsequently sought appellate review by the Supreme Court of Pennsylvania, again raising the issue of ineffective assistance of counsel, but that Court declined to hear Petitioner's appeal. Petitioner then filed a Writ of Certiorari to the United States Supreme Court but review was denied.

On January 30, 2001, Petitioner reasserted his arguments before the Pennsylvania trial court under the Post Conviction Collateral Relief Act ("PCRA"). On February 27, 2001, the trial court summarily denied the PCRA Petition

without a hearing. Upon appeal of that denial to the Superior Court of Pennsylvania, the Superior Court denied relief without granting any oral argument on the matter. The Pennsylvania Supreme Court denied certiorari.

Having exhausted his avenues of direct appeal, Petitioner, on March 8, 2002, timely filed his first and only Federal Habeas Corpus Petition in the United States District Court for the Eastern District of Pennsylvania. In his Petition, Petitioner continued to assert his argument regarding ineffective assistance of counsel.

On May 22, 2002, Magistrate Judge Charles B. Smith issued a Report and Recommendation denying Petitioner relief without a hearing. After consideration of Petitioner's objections thereto, on February 4, 2003, the Honorable William J. Yohn, Jr. issued an Order approving and adopting the Magistrate's Report and Recommendation. Judge Yohn's Order further stated that no Certificate of Appealability would issue.

Petitioner timely filed a Notice of Appeal from the Order of the District Court to the Court of Appeals for the Third Circuit, which was summarily denied October 23, 2003. A timely and substantiated Petition for Rehearing En Banc followed, which was summarily denied on November 21, 2003. This timely Petition for a Writ of Certiorari follows.

The charges upon which Petitioner was prosecuted arose from allegations that Petitioner had repeatedly sexually assaulted two minor children over the period of several years. The undisputed evidence at trial established that Petitioner, who had no prior criminal record, had been a friend of the father of the victims and had visited the home of the victims several times during the period in question. The totality of the Commonwealth's case against Petitioner consisted solely of the testimony of the two female victims. In defense, Petitioner's trial counsel relied solely on the testimony of a handful of character witnesses who testified to Petitioner's good reputation and chastity within the community. Counsel advised Petitioner against taking the witness stand to rebut the

testimony of the Commonwealth's witnesses or to provide any exculpatory testimony in his own defense.

At hearing on Petitioner's post-trial motions, trial counsel admitted that they advised Petitioner against testifying in his own defense at trial:

> Q. Now, during the time period that you represented Mr. McClure, did you ever suggest that Mr. McClure should not take the stand and testify on his own behalf?
>
> A. (Mr. Yurchak) I believe Mr. Garfield and I discussed that and that was our suggestion, yes. (N.T. 10/19/98, p. 6).

Defense counsel attributed this decision to concern that if Petitioner took the stand, he would be exposed to cross-examination or rebuttal evidence regarding an extra-marital consensual liaison in which he had engaged with the common law wife of the father of the two victims:

> Q. Would putting Mr. McClure on the witness stand have opened him up to the statement that he made about Susan O'Neill?
>
> A. (Mr.Yurchak) We felt it would.

(N.T. 10/19/98, p. 19).

* * *

> Q. And with regard to Mrs. O'Neill, you felt that the fact that may come out would have been damaging to him, is that correct?
>
> A. That is one of the factors we considered, yes.

(N.T. 10/19/98, p. 20).

As a result of trial counsel's unfounded concern, Petitioner did not take the stand and dispute the prosecution's elicited facts. Rather, trial counsel unreasonably induced Petitioner not to testify and fell back on a character defense.

REASONS FOR GRANTING THE PETITION

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT

A review of the record clearly establishes ineffective assistance of counsel, which argument has been summarily overlooked throughout this Habeas Corpus action. Specifically, the District Court overlooked the fact that Petitioner has consistently made the argument that his trial counsel, while operating under a mistake of applicable law, advised Petitioner not to exercise his right to take the stand in his own defense. It was this mistake of law which directly led trial counsel to then assert a character defense, leaving the prosecution's factual allegations and witnesses completely unchallenged.

Petitioner's entire defense was premised on trial counsel's underlying mistake of applicable law. Specifically, trial counsel advised Petitioner not to testify on his own behalf primarily because trial counsel believed to do so would subject Petitioner to cross-examination regarding Petitioner's consensual extra-marital affair with another adult. Undoubtedly, such evidence would clearly be inadmissible as irrelevant, and would further be barred under other applicable Pennsylvania Rules of Evidence, including Pa.R.E. 404, 608, and 609. As discussed below, any competent attorney, operating within the broad range of reasonableness, would not have advised Petitioner not to take the stand based solely upon this mistaken belief as to well-settled Pennsylvania evidentiary rules.

As argued consistently in the state court action and in this Habeas Corpus action, it was his mistaken belief that Petitioner would be subject to cross-examination regarding the consensual extra-marital affair that led Petitioner's trial counsel to fall back on a character defense. The District Court itself clearly recognized that "if the trial attorneys believed what [P]etitioner now claims they did, and this misconception

motivated [P]etitioner's decision not to testify, then the attorneys may have been incorrect as to the law." *See*, Appendix, 62a. This is an express recognition of the soundness of Petitioner's argument.

Notwithstanding this recognition, the District Court then falsely claimed that "this is a different issue than those raised in the post-conviction state proceedings and in [P]etitioner's federal petition and one for which no factual or legal basis is presented in the record before the court." *See*, Appendix, 62a. The decision of the Third Circuit Court of Appeals likewise vaguely states that Petitioner's claims lacked merit or were procedurally barred. This is incorrect. In fact, a tracing back of the state and federal post-conviction proceedings clearly demonstrates that Petitioner has consistently taken the position that trial counsel's underlying mistake of law kept Petitioner off the stand and directly resulted in the assertion of a character defense. For example, Petitioner's post-conviction Pennsylvania Supreme Court filings expressly stated that character witnesses were used "*...because of a defense decision not to put the accused on the stand..*", and "[t]hat was the sum of his defense: his good character." (emphasis added). Similarly, in a filing with the Pennsylvania Superior Court, Petitioner also stated that cross-examination regarding the extra-marital affair, "...clearly would be inadmissible as irrelevant.." and "[t]he evidence of such an encounter could have come in *only if the defense raised the issue first*, an act of ineffectiveness." (emphasis added).

This argument was also asserted in Petitioner's Brief in Support of Habeas Corpus originally submitted to the Federal District Court for the Eastern District of Pennsylvania. Specifically, Petitioner clearly stated, "[t]he point is that *the original error regarding a misstatement of the law led his client not to make any statement whatsoever.*" (emphasis added). *See*, Appendix, 25a. Further, "[a]s a matter of Due Process, there was no fair opportunity at trial to obtain an adjudication on the merits of Petitioner's case because he was

misled into not testifying on his own behalf to offer his testimony into evidence." *See*, Appendix, 25a.

Accordingly, Petitioner has not waived this argument, in either the state court post-conviction proceedings or in these Habeas Corpus proceedings. The District Court's mistaken ruling has been granted undue deference that it is not owed, as the pleadings evidence, exampled above. Based solely upon this issue, it is highly prejudicial to Petitioner for the lower courts to claim that "the habeas claims lack merit or are barred due to a procedural default for the reasons given by the Magistrate Judge and the District Court." This is especially true given the District Court's recognition that, "if the trial attorneys believed what [P]etitioner now claims they did, and this misconception motivated [P]etitioner's decision not to testify, then the attorneys may have been incorrect as to the law." *See*, Appendix, 62a.

To continue to claim this Habeas Corpus proceeding lacks merit and/or is procedurally barred results in extreme prejudice to Petitioner and is not a uniform application of state and federal law. To the contrary, the Third Circuit Court of Appeals has expressly held that a counsel's misrepresentation of applicable law vitiates the voluntariness of an accused's decision. Dickerson v. Vaughn, et al, 90 F.3d 87, 92 (3rd Cir. 1996). Dickerson involved a plea agreement under which the defendant was not advised that a plea of nolo contendere prevented any appeal of a pre-trial ruling. Id. at 89-90. The state argued that the defendant's execution of the colloquy barred such an argument. Id. The Third Circuit Court of Appeals ultimately held that the misrepresentation by defendant's counsel of applicable law about the appealability of double jeopardy once the guilty plea was entered vitiated the voluntariness of the plea, unless the state trial court addressed the point so clearly that it clearly cancelled out the mistaken advice of counsel. Id. at 91-92. The Dickerson court also cited several cases wherein it was held that guilty pleas are not voluntary when they are *induced by misleading statements of defense counsel*. Id. at 91 *citing* Zilich v. Reid, 36 F.3d 317, 320-321(3rd Cir. 1994); Lesko v. Lehman, 925

F.2d 1527, 1537 (3rd Cir. 1991); U.S. v. Marzgliano, 588 F.2d 395, 399 (3rd Cir. 1978); U.S. v. Valenciano, 495 F.2d 585, 587 (3rd Cir. 1974). (emphasis added). This principle clearly extends to the instant issue, wherein misleading statements of trial counsel induced Petitioner not to take the stand. Therefore, the decision not to testify, assuming arguendo Petitioner in fact made it, was not voluntarily and knowing.

Pennsylvania courts agree with this principle, holding that a decision whether to testify in one's own behalf is ultimately to be made by the accused after full consultation with counsel.[1] Commonwealth v. Neal, 421 Pa.Super. 478, 618 A.2d 438 (1992) *citing* Commonwealth v. Bazabe, 404 Pa.Super. 408, 590 A.2d 1298 (1991). Further, and most importantly, Pennsylvania law clearly states, "*[i]n order to support a claim that counsel was ineffective for 'failing to call the appellant to the stand', [appellant] must demonstrate* either that (1) counsel interfered with his client's freedom to testify, or (2) *counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.*" Neal, 421 Pa.Super. at 483. (citations omitted) (emphasis added).

That is exactly the present case. Petitioner was given specific advice by trial counsel that was based on a mistake of law so unreasonable that it vitiated Petitioner's somewhat ambiguous decision not to testify on his own behalf (assuming arguendo that Petitioner in fact made the decision after full consultation). This satisfies the Strickland test for ineffectiveness of counsel.

Under the two-part Strickland test, a sufficient indication that a trial counsel's assistance was defective enough to undermine confidence in the proceeding's result is evidenced by a petitioner's showing that the trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that

---

[1] The right to testify on one's own behalf is a sacred right conferred upon citizens by both the Pennsylvania and United States Constitutions. Commonwealth v. Breisch, 719 A.2d 352, 357, 1998 Pa.Super. LEXIS 2856.

but for trial counsel's professional errors, the result of the proceeding would have been different.[2] Bell v. Cone, 535 U.S. 685, 695, 122 S.Ct. 1843 (2002) *citing* Strickland, et al v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052 (1984).

Petitioner's trial counsel representation fell well below the Strickland standard as outlined above, as there is no conceivable manner in which Petitioner could have been subject to cross-examination regarding his consensual extra-marital affair with another adult absent the defense "opening the door."[3]

Specifically, the Pennsylvania Rules of Evidence, in conjunction with 42 Pa.C.S.A. §5918 (1982), govern the admissibility of evidence regarding Petitioner's extra-marital liaison. Where, as here, the crimes at issue do not concern the character of the accused, the Commonwealth is precluded from introducing any evidence as to the character of the accused unless it seeks to rebut character evidence introduced by the accused. *See*, P.R.E. 404; 42 Pa.C.S.A. §5918. In the event the accused "opens the door" to the Commonwealth's introduction of such evidence, the Commonwealth is permitted to introduce evidence of specific acts of the accused. *See*, P.R.E. 404(a)(1); 42 Pa.C.S.A. §5918. Thus, in a case such as Petitioner's, the Commonwealth is precluded

---

[2] Given the prosecution's wholly unrebutted case, the prejudice to the Petitioner undoubtedly exists, as his mere three (3) hour trial resulted in a prison sentence of 19 to 38 years.

[3] In addition, courts have held where an error of law results in a decision that the accused will not take the stand in his own defense, both federal and Pennsylvania state law recognize the inherent ineffectiveness of counsel. See; Commonwealth v. Neal, 618 A.2d 438 (Pa. Super 1992) (where Defendant had no criminal record that could be impeached, it is ineffective assistance of counsel not to advise the defendant to take the stand); Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990) (where Defendant lacked a criminal record that could have been impeached, was also not advised of her constitutional right to testify, faced a situation at trial where the outcome turned on the credibility of the victim, had a defense based on character, and also did not defend herself by testifying); Commonwealth v. Mancini, 490 A.2d 1377, 1386 (Pa. Super 1985) (recognizing that defense counsel could be ineffective without full consultation even if defendant decided not to testify.

from introducing evidence pertaining to the accused's character if the accused does not first introduce evidence of his character. Ironically, trial counsel himself may have actually "opened the door" by his institution of a character defense, although this "cracked door" was not exploited by the prosecution.

Trial counsel's mistaken belief that Petitioner would be subject to cross-examination about his extra-marital affair directly led trial counsel to advise Petitioner not to take the stand and *instead* rely upon a character defense. Had trial counsel understood the well-settled evidentiary principles of relevance, specifically with respect to Petitioner's extra-marital affair, and had trial counsel correctly advised Petitioner accordingly, the character defense would not have been fallen back on. This was not a decision within the realm of sound trial strategy. *See*, e.g. Commonwealth v. Martin, 346 Pa.Super. 129, 140, 499 A.2d 344 (1985); Cave v. Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992). Errors of law by counsel cannot be protected against ineffective assistance of counsel claims merely by being masked as "strategy." Where the error by counsel is not tactical but rather is an unacceptable legal blunder, such as when the lawyer fails to do proper research and ends up misunderstanding the law, counsel's ineffectiveness is manifest. Rather, the misapplication of applicable law relied upon by trial counsel in his specific advice to Petitioner was so unreasonable that it vitiated Petitioner's ability to voluntarily and knowingly relinquish his right to testify on his own behalf.

Trial counsel testified that they were concerned that a decision to put Petitioner on the witness stand would subject him to cross-examination on the issue of Petitioner's affair with the mother of the victims. Analysis of the relevant law, however, indicates that counsel's decision was misplaced. Counsel's advice to Petitioner, tainted by that mistake of law, nevertheless dissuaded Petitioner from exercising his constitutional right to testify in his defense and constitutes ineffective assistance of counsel.

The nature of the prosecution makes even more evident the prejudice Petitioner has suffered. Where, as here, there is absolutely no physical evidence and the outcome of the case turns solely on the credibility of the victim, the defendant's right to testify is of the utmost importance. See Neal, 618 A.2d 438 (holding that where the defendant's testimony would have rebutted the victim's incriminating testimony, the defendant's testimony was considered essential defense testimony); Breisch, 719 A.2d 352. As in Neal, the evidence put forth by the Commonwealth consisted solely of the testimony of the two victims, therefore Petitioner's testimony was essential to defense against those charges. That Petitioner was advised not to offer such testimony because his lawyers misunderstood Petitioner's exposure to cross-examination constitutes ineffective assistance of counsel.

Accordingly, Petitioner's argument outlined above is not procedurally barred. Further, under settled state and federal legal principles, trial counsel's misapplication of applicable law was directly relied upon by Petitioner, resulting in a character defense. This misapplication vitiated Petitioner's ability to knowingly and voluntarily relinquish his right to testify on his own behalf. For these reasons, Petitioner respectfully requests this Honorable Court grant his Petition for a Writ of Habeas Corpus.

CONCLUSION

Petitioner submits that he has substantially demonstrated the deprivation of the right to effective assistance of counsel. On appeal, Petitioner will establish that his trial counsel's performance dropped well below the objective standard contemplated by the Court in Strickland. Specifically, Petitioner's counsel, operating under a fundamental mistake of law, advised Petitioner not to take the witness stand in his own defense and the consequent decision not to take the stand prejudiced Petitioner's defense.

Accordingly, Petitioner respectfully requests that this Honorable Court issue a Certificate of Appealability and set a briefing schedule for Petitioner's appeal of the District Court's denial of Petitioner's Habeas Corpus Petition.

Respectfully submitted,

SHERRARD, GERMAN & KELLY, P.C.

James R. Hankle, Esquire
Attorney for Petitioner
PA I.D. No. 36019
Two PNC Plaza, 28th Floor
Pittsburgh, PA 15222-2602
(412) 355-0200

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 USC §2254

(eff. 8/1/01)

EDGAR D. McCLURE, PETITIONER

(Full name) (Include name under which you were convicted)

vs. CASE NO. _____(supplied by the Court)

HARRY E. WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, CRESSON PENNSYLVANIA RESPONDENT

(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE DISTRICT ATTORNEY OF THE COUNTY OF CARBON

and

THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, ADDITIONAL RESPONDENT

Edgar D. McClure DS-1529

Name Prison Number

State Correctional Institution at Cresson, Cresson, Pennsylvania

Place of Confinement

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS – READ CAREFULLY

1. YOU MUST INCLUDE ALL POTENTIAL CLAIMS AND SUPPORTING FACTS FOR WHICH YOU MIGHT DESIRE TO SEEK REVIEW BECAUSE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION CANNOT BE FILED EXCEPT UNDER VERY SPECIFIC AND RARE CIRCUMSTANCES REQUIRING CERTIFICATION BY THE THIRD CIRCUIT COURT OF APPEALS AS SET FORTH IN INSTRUCTION #13.

2. YOUR HABEAS CORPUS PETITION MUST BE FILED WITHIN THE 1-YEAR STATUTE OF LIMITATIONS TIME LIMIT SET FORTH IN 28 U.S.C. §2244(d)(1). IF YOU FILE A PETITION WITHIN THE 1-YEAR TIME LIMIT AND THEN WISH TO FILE A NEW ALL-INCLUSIVE HABEAS CORPUS PETITION RAISING ADDITIONAL CLAIMS, YOU CAN FILE A MOTION ASKING THE COURT FOR AN EXTENSION OF TIME OF 120 DAYS IF THE 1-YEAR TIME LIMIT HAS EXPIRED OR WILL EXPIRE WITHIN 119 DAYS OF THE DATE YOUR PETITION WAS FILED.

3. Any false statement of a material fact in your petition, in a motion for leave to proceed in forma pauperis, or in any other motion you file in this case may serve as the basis for prosecution and conviction for perjury.

4. This petition must be typewritten, printed, or legibly handwritten and signed by you as the petitioner on Page 12. You should answer all questions concisely in the proper space of the petition. If you need more room to answer any question, you may write on the reverse blank sides of the petition.

5. You may not attach additional pages to the petition. You do not have to list or cite the cases or law that you are relying on. If you do want to cite the cases and law you are relying on and make legal arguments, you should do so in a separate concise brief or memorandum which should be filed along with the petition.

6. When you file your petition, you must include a filing fee of $5.00. If you cannot pay the full filing fee, you must request permission to proceed in forma pauperis as explained in instruction #8.

7. Your petition will be filed if you have followed these instructions and it is in proper order. Petitions which are not in proper order will be returned to you with a notation as to what is improper.

8. To request permission to proceed in forma pauperis without paying the full filing fee, you must completely fill out pages thirteen through twenty of the petition. You should answer all questions and sign where indicated on Pages 13 and 19. You should see to it that an authorized prison official completes the certification on Page 20. You must prove that you cannot pay the full filing fee and other costs because of poverty and a discharge in bankruptcy will not excuse you from this requirement. The Court will let you know if you may proceed in forma pauperis.

9. Only final judgments entered by one state court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

10. As required by 28 U.S.C. §2254(b)(1), you must have exhausted all claims that you are making in your petition. This means that every claim must have been presented to each level of the state courts. If you file a petition that contains claims that are not exhausted, the federal court will dismiss your petition and send it back to you so that you can exhaust all your claims and file your petition again. 28 U.S.C. §2254(b)(2) provides that if it is perfectly clear that no colorable claims are presented, the federal court can also deny your petition on the merits.

11. As required by 28 U.S.C. §2254(e)(1), a federal court, when considering your habeas corpus petition, must deem as correct a determination of fact made by a state court unless you rebut the presumption of correctness by clear

and convincing evidence. Under 28 U.S.C. §2254(e)(2), if you have failed to develop the factual basis of a claim in state court proceedings, a federal court cannot hold an evidentiary hearing on that claim unless you show that:

(i) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable, or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence.

You must also show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found you guilty of the offense in question.

12. As required by 28 U.S.C. §2244(b)(1), a federal court must dismiss any claim in a second or successive habeas corpus petition that was presented in a prior habeas corpus petition.

13. As required by 28 U.S.C. §2244(b)(2), a federal court must dismiss any claim in a second or successive habeas corpus petition that was not presented in a prior habeas corpus petition unless you show:

(A) the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence, and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found you guilty of the offense in question.

Before such a second or successive petition may be filed in the district court, however, the petitioner must move

the court of appeals for an Order authorizing the district court to consider the petition. Petitioner's motion for such an Order must be determined by a three judge panel of the court of appeals, which must grant or deny the motion within 30 days. The court of appeals may grant the motion only if it determines that the petition makes a prima facie showing that it satisfies either (A) or (B) above.

14. 28 U.S.C. §2254(i) provides that ineffectiveness of counsel during post-conviction, habeas corpus and P.C.R.A. proceedings in state or federal court may not be the grounds for relief in your petition.

15. When the petition is fully completed, the **original and four copies** must be mailed to the **Clerk of the United States District Court, Room 2609, 601 Market Street, Philadelphia, PA 19106.**

PETITION

1. (a) Name and location of court which entered the judgment of conviction under attack: Court of Common Pleas of Carbon County, 2-4 Broadway, Jim Thorpe, PA 18229-0166

(b) Name of Prosecutor: David W. Addy, Esquire

(c) Prosecution conducted by District Attorney's Office of _____ County

2. (a) Date of Judgment of conviction: June 9, 1998

(b) Indictment number or numbers:_____

Term: _____ Criminal Case No. 260 CR 96

3. Length of sentence: 19-38 years Sentencing Judge: Richard W. Webb

4. Nature of offense or offenses for which you were convicted: Rape, Statutory Rape, Involuntary Deviate Sexual Intercourse, Indecent Assault, Corruption of Minor, and Criminal Conspiracy.

5. What was your plea? (check one)

(a) Not Guilty (x) (b) Guilty ( ) (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

6. Kind of trial: (check one)

(a) Jury (x) (b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction?

Yes (x) No ( )

9. If you did appeal, answer the following:

(a) Name of court: Superior Court of Pennsylvania

(b) Result: Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Carbon County without opinion.

(c) Date of Result: August 2, 1999

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: On August 31, 1999, Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania; on January 13, 2000, the Supreme Court of Pennsylvania issued an Order denying Petitioner's Petition for Allowance of Appeal; on April 7, 2000, Petitioner filed a Petition for Writ or Certiorari with the Supreme Court of the United States; and on June 12, 2001, the Supreme Court of the United States entered an Order denying Petitioner's Petition for Writ of Certiorari.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of Court: Court of Common Pleas of Carbon County

(2) Nature of proceeding: Petition for Post-Conviction Collateral Relief.

(3) Grounds raised: Trial court erred in failing to find ineffectiveness of counsel, Courts of Pennsylvania abused their discretion, violated due process, and frustrated the ethical duty of defense counsel to competently represent Petitioner when the courts, in undertaking review functions, simply adopted the Opinion of the court below that failed to address the merits of the central legal issue raised by Petitioner.

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No (x)

(5) Result: The Court of Common Pleas of Carbon County denied the Petition for Post-Collateral Relief.

(6) Date of result: February 27, 2001

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: _____

(2) Nature of proceeding: ____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court: _____

(2) Nature of proceeding :_____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ( ) No ( )

(5) Result: _____

(6) Date of result: _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (x) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( )No ( )

(e) If you did <u>not</u> appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all you state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one of more of these grounds for relief, you must allege facts in support of the grounds which you choose. Do not check any of the ground or grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, (where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim).

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denial of effective assistance of counsel.

Supporting FACTS (tell your story briefly without citing cases or law): Trial counsel was ineffective for failing to put Petitioner, who had no prior record, on the stand in his own defense, rather than relying solely on character witnesses on behalf of his client. The prosecution's case consisted of the testimony of the two female victims. Trial counsel's excuse was his reasoning that under the Pennsylvania Rules of Evidence the prosecution would be able to expose to the jury on cross-examination that Petitioner had a consensual sexual liaison with the mother of the victims on an occasion after the children had been molested. This evidence relating to the consensual sexual liaison with the mother was absolutely barred by the Rules 608 and 609 of the Pennsylvania Rules of Evidence.

B. Ground two: Denial of right of appeal/denial of due process under the Fourteenth Amendment.

Supporting FACTS (tell your story briefly without citing cases or law: The trial court failed to address the issue of whether the aforementioned potentially-impeaching evidence regarding the consensual sexual relationship between Appellant and the minor victims' mother was barred by the Pennsylvania Rules of Evidence. The Superior Court likewise

refused to address the applicability of the Pennsylvania Rules of Evidence and opted to simply adopt the trial court's deficient opinion. The Pennsylvania Supreme Court refused to grant a Writ of Certiorari on the issue. On February 27, 2001, the trial court denied Petitioner's Post-Conviction Relief Act Petition without a hearing. Appeal was taken to the Superior Court of Pennsylvania that likewise denied relief without granting oral argument and totally avoided the issue of the applicability and effect of Rules 608 and 609 of the Pennsylvania Rules of Evidence.

C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law:

_____

D. Ground four:

Supporting FACTS (tell your story briefly without citing cases or law: _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ( ) No (x)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Michael Garfield, Esquire, Route 903, Professional Building, Albrightsville, Pennsylvania 18210.

(b) At arraignment and plea: Waived.

(c) At trial: Michael Garfield, Esquire, Route 903, Professional Building, Albrightsville, PA 18210;

and Robert T. Yurchak, Esquire, 1 East Catawissa Street, Nesquehoning, PA 18240.

(d) At sentencing: James R. Hankle, Esquire, 35th Floor, FreeMarkets Center, Pittsburgh, PA 15222-2602.

(e) On appeal: James R. Hankle, Esquire, 35th Floor, FreeMarkets Center, Pittsburgh, PA 15222-2602.

(f) In any post-conviction proceeding: James R. Hankle, Esquire, 35th Floor, FreeMarkets Center, Pittsburgh, PA 15222-2602.

(g) On appeal from any adverse ruling in a post-conviction proceeding: James R. Hankle, Esquire, 35th Floor, FreeMarkets Center, Pittsburgh, PA 15222-2602.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ( ) No (x)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future:

_____

(b) And give date and length of sentence to be served in future:

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No ( )

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/28/02 /s/ Edgar D. McClure

Signature of Petitioner

/s/ James R. Hankle

Signature of Attorney (if any)

CERTIFICATE OF SERVICE

I, James R. Hankle, Esquire, do hereby certify that a true and correct copy of the within **Petition for Writ of Habeas Corpus and Brief in Support of Habeas Corpus Petition** was served on the below listed counsel for the Commonwealth of Pennsylvania via first-class United States mail, postage prepaid, this 6 day of March, 2002:

David W. Addy, Esquire

Gary F. Dobias, Esquire

Assistant District Attorney

Carbon County Courthouse

Two Broadway

Jim Thorpe, PA 18229-0036

/s/ James R. Hankle

James R. Hankle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE, NO. CA 02-1206
Petitioner,

v.

HARRY E. WILSON, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION
AT CRESSON, PENNSYLVANIA,
Respondent.

BRIEF IN SUPPORT OF HABEAS CORPUS PETITION

JAMES R. HANKLE, ESQUIRE
PA I.D. NO. 36019
SHERRARD, GERMAN
& KELLY, P.C.
35th Floor, FreeMarkets Center
Pittsburgh, PA 15222-2602
Firm No: 006
Attorney for Petitioner,
Edgar D. McClure

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE,

Petitioner, NO.

v.

HARRY E. WILSON, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION AT
CRESSON, PENNSYLVANIA,

Respondent.

BRIEF IN SUPPORT OF HABEAS CORPUS PETITION

STATEMENT OF THE CASE

On June 9, 1998, a three hour jury trial was held in the Court of Common Pleas of Carbon County, Pennsylvania, and Edgar D. McClure ("Petitioner") was found guilty of five (5) counts of rape, five (5) counts of statutory rape, four (4) counts of involuntary deviate sexual intercourse, nineteen (19) counts of indecent assault, two (2) counts of corruption of minors, and two (2) counts of criminal conspiracy. Petitioner was sentenced to a prison term of nineteen (19) to thirty-eight (38) years.

The uncontroverted facts at trial indicate that defense counsel failed to put Petitioner on the stand in his own defense, but rather, relied solely on character witnesses on behalf of his client. The prosecution's case consisted of the testimony of the two female victims. In Petitioner's post-sentence motion and hearing, Petitioner was represented by new counsel who argued, *inter alia,* ineffective assistance of trial counsel by not affirmatively advising Petitioner to testify in his own defense when Petitioner's testimony would have been exculpatory and not have exposed Petitioner to impeachment regarding prior consensual sexual conduct with the mother of the victims.

The trial court erroneously rejected the citation of error on ineffectiveness of counsel by concluding that trial counsel was justified in not calling Petitioner to testify for two reasons. First, the trial court reasoned that Petitioner would have been subject to cross-examination by revealing that he had visited the house of the two girls. Secondly, the trial court reasoned that the prosecution would have been able to expose to the jury on cross-examination that Petitioner had had a sexual liaison with the mother of the girls on an occasion after the children had been molested. Trial counsel's and the trial court's reasoning was fundamentally flawed. The evidence relating to the consensual sexual liaison with the mother was absolutely barred by the Pennsylvania Rules of Evidence, and therefore, trial counsel's basic reason for not putting him on the stand in his own defense had no merit, since the testimony of the two girls had already established Petitioner's presence in the home.

The trial court's Opinion was silent on the issue of the Rules of Evidence. In Petitioner's appeal to the Superior Court of Pennsylvania, the issue was properly raised and briefed. The Superior Court, however, issued a ruling that "We . . . adopt the trial court opinion in its entirety and affirm on that basis." The Superior Court refused to address the issue on the merits. An appeal was then taken to the Supreme Court of Pennsylvania, which refused to grant review. Petitioner then filed a Writ of Certiorari to the Supreme Court of the Untied States. Review was denied, and on January 30, 2001, Petitioner went back to the Pennsylvania trial court under the Post Conviction Collateral Relief Act ("PCRA"). On February 27, 2001, the trial court summarily denied the PCRA Petition without a hearing. Appeal was taken to the Superior Court of Pennsylvania that likewise denied relief without granting oral argument.

Petitioner could not have been subject to such cross-examination under the Pennsylvania Rules of Evidence, and therefore, it was a matter of ineffective representation by defense counsel at trial not to advise Petitioner to defend himself by testifying on his own behalf because trial counsel's

basis for the decision was fundamentally flawed. The basis of Petitioner's continued argument is that Pa. R. E. 608 and 609 would have barred the prosecution from eliciting information from Petitioner, any other witness, or any other source whatsoever, regarding Petitioner's consensual sexual encounter with the mother. Although Petitioner properly raised and briefed this issue on appeal, that such cross-examination was barred by Rules 608 and 609, up to this point every court has refused to explain how or why those Rules do not apply to this case. No court so far has even mentioned the central issue on appeal: that Rules 608 and 609 are directly contrary to the statements of the law by defense counsel who, therefore, gave advice to his client which was incorrect as a matter of law. This is a clear case of ineffective assistance of counsel. And the equally outright refusal of the courts to address the issue and correct trial counsel's prejudicial errors by ordering a new trial constitutes violations of Petitioner's Due Process and Sixth Amendment rights. It is precisely this refusal, and not the meanings of the rules themselves, that comprises the instant allegation of violations of Due Process and the Sixth Amendment.

The refusal of the state courts to explain the alleged non-applicability of Rules 608 and 609 has resulted in interrelated egregious violations of Due Process and the Sixth Amendment. First, as a matter of basic legal fairness, a convicted person who is once afforded a right to appeal is then entitled to a fair examination of the issues. Second, without an adequate explanation of the reasons for any decision by an appellate court, the defense was prejudiced in planning further appropriate appeal strategy, since appellate counsel has no appellate judicial reasoning to evaluate and upon which to base his advise to his client. This further compounds the violation of Due Process as well as the Sixth Amendment right to counsel.

This appeal does not challenge the power of state appellate courts to adopt an opinion below when that opinion is dispositive of the issues. Had the trial court rendered such an opinion, addressing the issues raised on the merits, and

properly applying P.R.E. 608 and 609 to analyzing trial counsel's actions, Petitioner would not be this issue on appeal. On the other hand, when the trial court opinion fails to even address the issues raised, an appellate court cannot simply adopt that opinion and remain consistent with Due Process and the Sixth Amendment's right to effective appellate counsel. Simply put, where a trial court's opinion incorrectly applies the law and rules of evidence to the prejudice of a defendant, appellate courts must analyze the issue raised and explain its rulings.

ISSUES

I. **Petitioner is entitled to a habeas corpus hearing under the Antiterrorism and Effective Death Penalty Act 1996, § 101, 110 Stat. 1217, 1220 (1996), (codified at 28 U.S.C. 2254(d) (2000)):**

A. Petitioner is in custody in violation of the Constitution or laws or treaties of the United States;

B. The Commonwealth of Pennsylvania has no presumption of correctness because it failed to respond to issues properly raised on appeal.

II. **Petitioner suffered from ineffective assistance of counsel in derogation of his Sixth Amendment rights.**

III. **Petitioner was deprived of Due Process under the Fourteenth Amendment because the state appellate process failed to provide adequate and specific reasons for their rulings in response to a specific allegation of error by the trial counsel.**

ARGUMENT

Petitioner in this habeas corpus appeal has consistently advanced interrelated arguments as follows: (1) he admitted to the police and to trial counsel that prior to his own trial he had a consensual adult sexual liaison with the mother of the female child victims; (2) on his knowledge, trial counsel advised him that he could be cross-examined as to this incident regarding his chaste character that had been put into

evidence by his own witnesses; (3) Petitioner then did not take the stand; (4) even assuming *arguendo* that the Petitioner made a free decision (which he did not) not to testify, the basis of his decision was the erroneous advice by his trial counsel; (5) he could not have been questioned about the sexual liaison because it was barred by Pennsylvania Rules of Evidence, Rules 608 and 609, which prohibit such questioning both as to the liaison itself and as to chastity; (6) the trial opinion stated in a merely conclusory fashion that "specifically, McClure [Petitioner] could have been cross-examined about his admissions to the police of sexual relation with the victims' mother" and would have "contradicted McClure's claim of good character for chastity." (Trial Op. p. 15); (7) at all times on appeal, Petitioner has correctly argued that such a reading of the statute was in error; (8) every subsequent appeal accepted the trial court's conclusions without ever analyzing Petitioner's specific argument under Rules 608 and 609 nor even granting oral argument to permit discussion; (9) the only exception to these omissions occurred post-conviction when the Superior Court opinion made a cursory reference to Pa. R. Evid. Rule 404; and (10) at no other time was any reference made to the meaning of Rules 608 and 609, even though Rule 404(a)(3) specifically provides that "Evidence of a pertinent trial of character of a witness is admissible as provided in . . . 608 (character and conduct of a witness) and 609 (evidence of conviction of crime). *The issue that must be addressed in this Petition is how Rules 608 and 609 affects 408, but despite repeated requests, the judiciary has not been willing to answer that central question.*

From the above facts, the following conclusions can be reached: (1) trial counsel was ineffective per se under the Sixth Amendment for erroneously advising his client on a matter of law and thereby inducing him not to be a witness in his own defense; (2) the failure of the appellate judiciary to adjudicate the meanings of its own rules had the direct effect of blinding appellate counsel in his ethical ability to properly advise his client as to appeals and appellate strategy, without analysis it is extraordinarily difficult to understand the rulings of the court.

ISSUE I.

Petitioner is entitled to a habeas corpus hearing under the Antiterrorism and Effective Death Penalty Act 1996, § 101, 110 Stat. 1217, 1220 (1996), (codified at 28 U.S.C. 2254(d) (2000)):

A. Petitioner is in custody in violation of the Constitution or laws or treaties of the United States;

B. The Commonwealth of Pennsylvania has no presumption of correctness because it failed to respond to issues properly raised on appeal.

Petitioner seeks a habeas corpus hearing pursuant to the Antiterrorism and Effective Death Penalty Act, § 101, 110 Stat. 1217, 1220 (1996), codified at 28 U.S.C. § 2254(d) (2000), (hereinafter "AEDPA"). In the instant case, Petitioner, presently a state prisoner, is required to have presented the federal courts with the same issue fairly presented to the state courts. Picard v. Connor, 404 U.S. 270, 276-277 (1970). State remedies are exhausted when the prisoner utilizes all procedures available under state law to raise his claim. 28 U.S.C. § 2254(b)(1)(A). All of these requirements have been met by proceedings in the state courts.

Under Townsend v. Sain, 372 U.S. 293 (1963) and its progeny, Petitioner is entitled to an evidentiary hearing on the within habeas corpus petition as the facts as alleged and to be proved will entitle Petitioner to relief. The allegations raised must, and in fact do, flow from the concept of "fundamental fairness" as determined under the Bill of Rights. Dowling v. United States, 493 U.S. 342 (1990); Medina v. California, 505 U.S. 437 (1992). Petitioner's Sixth and Fourteenth Amendment rights were violated when he suffered ineffective assistance of counsel and the subsequent refusal by the state courts to render adequate opinions. His conviction was the result of a fundamental defect that has led to a miscarriage of justice. Reed v. Farley, 512 U.S. 339, 348 (1994); Hill v. United States, 368 U.S. 424, 428 (1962).

The state courts in this instance are not entitled to a presumption of correctness for two reasons. First, the issue of ineffective assistance of counsel is one of mixed law and fact and not entitled to a presumption of correctness. Strickland v. Washington, 466 U.S. 668, 698, (1984); Deputy v. Taylor, 19 F.3d 1485, 1496 (3d Cir. 1994); Pratt v. Cain, 142 F.3d 3226, 230 (5th Cir. 1998); Lightburne v. Dugger, 829 F.2d 1012 (11th Cir. 1987), cert. denied, 488 U.S. 934 (1988). In the same vein, a state court's conclusion that constitutional error is harmless is likewise a mixed question of law and fact. Jackson v. Byrd, 105 F.3d 145, 147 (3d Cir. 1997). The case under appeal here, of course, does not include a "mere error of state law" as there is no state legal determination at all, and there is thus no way of determining if it was error. Additionally, the presumption of correctness applies to both trial and appellate determinations. Sumner v. Mata, 449 U.S. 539, 547 (1981); Flamer v. Delaware, 68 F.3d 710, 724 (3d Cir. 1995).

Secondly, a state court decision deserves deference only if the state court adjudicated the issue "on the merits". 28 U.S.C.A. § 2254(d)(2). The federal court must grant a hearing where there has been an "unreasonable determination" and, therefore, no deference should be shown to state trial courts which made "no record of findings and conclusions of law." Moor v. Jarvis, 885 F.2d 1565, 1570 n.9 (11th Cir. 1989) (emphasis added). Under 28 U.S.C.A. § 2254(d)(2), where a state court opinion is incapable of being at least implicitly understood, the opinion must be evidenced by a writing that adjudicates the "merits", while § 2254(d)(8) requires that a state's determination must be substantively reasonable. The Third Circuit Court of Appeals has held that a finding of effective assistance must be implicit in the state court record. Weeks v. Snyder, 219 F.3d 245, 259 (3d Cir. 2000).

Nor under these facts can the federal court "look through" to the last state opinion expressly dismissing a petitioner's claim. In this case, that would be the Opinion of the Superior Court on the post-conviction appeal. Once again, however, even that Opinion totally avoids the issue of the

effect of Pennsylvania Rules of Evidence 608 and 609, and simply adopts the trial court's decision by merely engaging in conclusory statements denying Petitioner relief without addressing the issues properly raised and briefed.

When claims are fully raised and presented, and state appellate courts have had every opportunity to examine the issues, they may perform the review so poorly (or, as in the case at bar, not at all) such that it results in a violation of Due Process. Where there is a totally deferential approach, it can lead to the flawed conclusion that the appellate court's judgment is infallible, and the Due Process Clause is rendered meaningless if it is assumed that a court is incapable of error.

In conclusion, it must be reiterated that the complaint herein is not that an appellate court cannot adopt an opinion below without its own writing. Rather, such an adoption cannot be reasonable when the lower court's opinion is simply conclusory and devoid of any legal reasoning.

The federal remedy is to hold a hearing on the issue of whether the state court's determination deserves a presumption of correctness.

ISSUE II.

Petitioner suffered from ineffective assistance of counsel in derogation of his Sixth Amendment rights.

The governing case in this area of law is Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court explicitly held that legal representation is ineffective when it falls below an objective standard of competence. Strickland, 466 U.S. at 686-88. ". . . the right to counsel is the right to the effective assistance of counsel." Strickland, 466 U.S. at 686. (Citing: McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970)). In assessing a claim of ineffectiveness, The United States Supreme Court has further held that courts should employ a strong presumption of competence and, as well, use a deferential standard of review in recognition of the fact that often a counsel's decisions will be strategic in nature and should not be subject to the

hindsight of a new standard. Kimmelman v. Morrison, 477 U.S. 365, 385-87 (1986). See also: Strickland, 466 U.S. at 689 (a court is to make "every effort . . . to eliminate the distorting effects of hindsight. . . "). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Strickland, 466 U.S. at 688.

In some cases, the error by counsel was not tactical but was rather an unacceptable legal blunder, as, for example, when the lawyer fails to do proper research and ends up misunderstanding the law. See: Cave v. Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992) ("[W]e wish to emphasize the District Court's observation that the mere incantation of the word "strategy" does not insulate attorney behavior from review."). Compare: United States v. Wiener, 127 F.Supp. 2d 645, 648-649 (M.D. Pa. 2001) (recognizing that a counsel's failure to understand and explain the sentencing guidelines is a ". . . necessity for counsel who seek to give effective representation.") (citing: United States v. Day, 966 F.2d 39, 43 (3d Cir. 1992)); Dooley v. Petsock, 816 F.2d 885, 890-891 (3d Cir. Pa. 1987) (trial counsel cannot be ineffective for failing to advise a client and in presenting a defense when the client neglected to provide the essential facts to counsel, because ". . . clairvoyance is not required of effective trial counsel.") (citing: Jackson v. Scully, 781 F.2d 291 (2d Cir. 1986) (counsel not ineffective by not raising a Fourth Amendment challenge to arrest when the accused failed to inform counsel of the circumstances of the arrest.) Under these circumstances, trial counsel's prejudicial blunder as to a legal rule must be differentiated from strategic considerations on the part of counsel.

The facts of Petitioner's instant case fall into the latter category of a per se legal error. If Pennsylvania Rules of Evidence 608 and 609 govern this case and would have barred the admission of the evidence of the consensual sexual liaison between Petitioner and the mother, then trial counsel had to have induced his client not to take the stand by virtue of an error as to black-letter law. Either the Pennsylvania Rules of

Evidence apply to have barred the evidence, in which case counsel was dead wrong in his advice to Petitioner not to testify, or the evidence could have come in and counsel was thereby effective. The problem is therefore not one of strategy. A defense of strategy cannot be used to justify a mistake of law that caused the strategy in the first place. Further, this is not an analysis tainted by hindsight. The evidence to be offered was known to trial counsel, as were Pennsylvania Rules of Evidence 608 and 609. Where trial counsel mistakes the law, whether deliberately or mistakenly, ineffectiveness assistance of counsel is an error per se. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992) (construing Strickland). Pennsylvania case law supporting this point was raised before the state courts, but was ignored. See: Commonwealth v. Leslie Breish, 719 A.2d 352 (Pa. Super 1998) (where Defendant lacked a criminal record that could have been impeached, was also not advised of her constitutional right to testify, faced a situation at trial where the outcome turned on the credibility of the victim, had a defense based on character, and also did not defend herself by testifying); Commonwealth v. Mancini, 490 A.2d 1377, 1386 (Pa. Super 1985) (recognizing that defense counsel could be ineffective without full consultation even if defendant decided not to testify); Commonwealth v. Neal, 618 A.2d 438 (Pa. Super 1992) (where Defendant had no criminal record that could be impeached, it is ineffective assistance of counsel not to advise the defendant to take the stand.); Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990) (same).

Nor is there any basis for the Commonwealth's position that Petitioner made his own decision not to testify after consultation. First, the record indicates that the consultation was ambiguous and tentative at best. Assuming arguendo that the advice given was forthright, how is it possible to cover or excuse the fact that the attorney's understanding and resulting advice of legal alternatives was erroneous? The only solution is to resolve the primary problem of the applicability of Pennsylvania Rules of Evidence 608 and 609, a task that the state judiciary has refused to undertake at any time. The federal court should be

very disturbed at the fact that trial counsel misunderstood the law. See: Singletary, 971 F.2d at 1518 (characterizing a trial counsel's misunderstanding of the law to be disturbing in considering a claim of ineffectiveness).

The Commonwealth's position, moreover, has consistently mistaken the rule of impeachment by bad acts. In effect, the Commonwealth defends the argument that if Petitioner had a sexual liaison with an adult woman, then it would be more probable than not that he would be a child molester. While a court has discretion to balance the probative versus prejudicial value of the evidence, it is textbook law that substantive evidence of one bad act cannot be used to prove guilt in the present proceeding, except in limited situations not applicable here.

The Commonwealth's repeated assertion that Petitioner must prove that the proffered omitted evidence would have tended to absolve him is a misunderstanding of the issue, and the point of Petitioner's arguments. The point is that the original error regarding a misstatement of the law led his client not to make any statement whatsoever. It is patently unfair to mislead a defendant into not taking the stand and then insist that the defendant prove his innocence by advancing defense theories on appeal. As a matter of Due Process, there was no fair opportunity at trial to obtain an adjudication on the merits of Petitioner's case because he was misled into not testifying on his own behalf to offer his testimony into evidence. Petitioner should have been given the chance to take the stand, deny the charges, and allow the jury to decide his truthfulness. Petitioner was prepared to offer into evidence his work schedule that would have corroborated his claim by demonstrating that he was often not physically capable of being at the home of the victims at the times alleged by the Commonwealth. The evidence presented by the prosecution was the testimony of the two (2) victims, who testified to the alleged acts, and a police officer whose role was limited to detailing the investigation. The evidence against Petitioner pertaining to his alleged commission of the crimes charged consisted solely of the oral testimony of the

two (2) victims. Trial counsel's defense was to use several character witnesses as to testify to Petitioner's good character. As a result of trial counsel's flawed reasoning and failure to understand the Rules of Evidence, the defense put to the jury failed to contain any direct denial of the charges by the one person whom the jury would want to hear from most, the Petitioner. Without Petitioner's testimony, the jury was left with only one side of the story, and as a result, Petitioner was convicted.

The federal remedy is to hold a hearing on the issue of whether Petitioner is entitled to a new trial.

ISSUE III.

Petitioner was deprived of Due Process under the Fourteenth Amendment because the state appellate process failed to provide adequate and specific reasons for their rulings in response to a specific allegation of error by the trial counsel.

The traditional line of federal cases holds, in general, that there is no constitutional requirement that a court state its reasons in support of its rulings. It is not a violation of Due Process if an appellate court decides a case without rendering an opinion. Harris v. Rivera, 454 U.S. 339, 344-45 (1981); King v. Champion, 55 F.3d (10th Cir. 1995); United States v. Baynes, 548 F.2d 481 (3d Cir. 1977). A careful examination of the rationale behind these cases reveals that in each instance the trial court's opinion was sufficient in terms to cover factual and legal issues in a dispositive manner. In Harris v. Rivera, the United States Supreme Court explained that

> the work of appellate judges if facilitated when trial judges make findings of fact that explain the basis for controversial rulings . . . [but] there are occasions when an explanation for a decision may be required by the demands of due process.

Harris, 454 U.S. at 344.

The possibility of such a violation was also addressed in Arizona v. Washington, 434 U.S. 497, 517 (1978) (cited in

Harris); Morrissey v. Brewer, 408 U.S. 471 (1972); Wolff v. McDonell, 418 U.S. 539, 564-565 (1974). In King v. Champion, the Tenth Circuit Court of Appeals refused to insist on a written opinion because of the "thoughtful consideration of the case" by the lower court. King, 55 F.3d at 526. See also: Furman v. United States, 720 F.2d 263, 265 (2d Cir. 1983) ("thoughtful consideration has been given to the claims raised in the appeal"); NLRB. v. Amalgamated Clothing Workers of America, 430 F.2d 966-971-972 (5th Cir. 1970) (cited as authority in Baynes by the Third Circuit). The Eleventh Circuit has repeatedly insisted that state courts write opinions where even an implicit finding "cannot be imagined from thin air." Meeks v. Singletary, 963 F.3d 316, 319-320 (11th Cir. 1972). In Meeks, the tribunal held a claim of ineffectiveness on the grounds that the:

> district court's discussion of petitioner's claim of ineffectiveness at trial, *much like the state's response,* consisted mostly of a summary of testimony given at the hearing.

(Emphasis added.) Id.

Other federal decisions have referred to the character of inadequate state court opinions as a "so-called finding" that "was simply an observation." Johnson v. Trigg, 28 F.3d 639, 644 (7th Cir. 1994). Often the record simply fails to indicate that the state court made any determinations that were supported by evidence. Coleman v. Zant, 708 F.2d 541, 548 (11th Cir. 1983).

In this allegation of a violation of Due Process, (1) the evidence could not have been admitted, and (2) the state courts have failed to make a legal determination of the basis for its contrary opinion. The Due Process Clause places restraints on the state adjudication of the *appellate* process for criminal defendants. Where a state acts in the appellate process, it must do so within the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 404 (1985) (reversing the long-held view that the Federal Constitution has no concern for a state's appellate process or rights).

The landmark case of Strickland v. Washington held that the United States Constitution guarantees a fair trial based on the Due Process Clause, and the basic elements of a fair trial are derived from the Sixth Amendment's Counsel Clause. Strickland, 466 U.S. at 684-685. (Holding that "[t]he Constitution guarantees a fair trial largely through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment..."). Strickland's convergence of these two Constitutional principles, must, to ensure a fair trial, be extended to appellate procedures as well.

While federal courts have no supervisory power over state trial courts, the "work of appellate judges is facilitated when trial judges . . . explain controversial rulings" in accordance with due process principles, even though the occasion for explanations are "the exception rather than the rule." Harris v. Rivera, 454 U.S. 339 (1987). Where there is a valid allegation that evidence would have been barred from trial because of a state rule, thus demolishing trial counsel's reasoning in not putting Petitioner on the stand, summary dispositions by the appellate courts must be seen as providing one of those exceptions. The right to counsel "is the right to *effective* assistance of counsel," McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970), and there should be no interference with the ability of counsel to make independent decisions about how to conduct a defense. Geders v. United States, 425 U.S. 80 (1976).

The defense process must, by necessity, include the appellate process. Denial of effective counsel is a direct violation of Due Process and the right to a fair trial. Powell v. Alabama, 287 U.S. 45, 58 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963). The same standard should apply to the appellate process, for while it appears repugnant to our sense of fair play to have a trial court deny defendant's access to information required for the preparation of a defense at that level, it should be equally importer to deny appellant's critical information that is needed for the appellate process. "Due Process embodies the

differing rules of fair play." Hannah v. Larche, 363 U.S. 420 (1960). A rejection of the written appellate reasons requirement is inconsistent with our constitutional plan of government at the trial stage, and for identical reasons in the appeals process. The failure of appellate courts to state in writing the reasons for their decisions is one of the most pernicious ingredients of judicial unfairness.

As an interrelated violation of the Due Process and the Sixth Amendment, new appellate counsel is severely hampered in advising his client regarding appellate strategy where courts refuse to address issues properly raised on appeal. Appellate counsel herein is left with opinions bereft of rationale behind the judicial determination appealed from. Beyond the disservice imposed upon Petitioner, Appellate counsel likewise lacks the necessary legal information needed to advise a client whether to proceed further in the chain of appeals. The fact that a court so interferes with one of an attorney's highest duties to his client, that of competent representation, serves in a striking fashion to underscore the existence of a violation of Due Process. While the concept of effective assistance is usually limited to trial tactics, it is no less important to apply the same standards to appellate representation where it is well settled that ineffectiveness will also lie. Cervo v. Fauver, 616 F.2d 714 (3rd Cir. 1980), *cert. denied*, 449 U.S. 858 (1980).

The Supreme Court's own decisions regarding the right to appellate Due Process have not yet indicated a finality on the subject. In Kimmel v. Morrow, 477 U.S. 365, 383 (1986), the court decided that relief on ineffective assistance grounds will be afforded regardless of the "underlying attorney error." It is imperative to ask how appeals can be perfected when state appellate courts outright refuse to address valid issues properly before them and thus eclipse a matter of fundamental importance to an incarcerated defendant. How, as required by law, can appellate counsel adequately weigh whether to even take an appeal in the first instance? Anders v. California, 386 U.S. 738 (1967). And finally, what justice is there in having clients pay money to appellate attorneys who are forced to

make educated guesses in the face of a mute judicial system? State appellate courts must be held to the same standards as administrative and probation hearings that require written opinions in support of decisions.

In the area of administrative law, federal courts have generally required that decisions be based on formal findings. A leading case, Matlovich v. Secretary of the Air Forces, 591 F.2d 852 (D.C. Cir. 1978), held that a reasoned explanation is designed "to inform the aggrieved person of the grounds of the administrative action so he can plan his course of action." A person adversely affected by a decision, and their counsel as well, are thereby in a much better position to determine the legitimacy of a holding. Additionally, the reasoned explanation requirement forces a disclosure of why a particular decision was reached and in a cumulative sense leads to greater consistency in the law. See also: Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (procedural due process requiring a statement of reasons to terminate welfare benefits is one of the "minimum procedural safeguards" attaching to administrative proceedings).

The Supreme Court has held as well that a required statement of reasons flows from the Due Process Clause to parole revocation and probation proceedings and prison disciplinary procedures. See, respectively, Morrisey v. Brewer, 408 U.S. 471 (1972); Wolff v. McDonnell, 418 U.S. 559 (1974).

The marked trend in the case law of this Court, therefore, is towards granting increased access to the reasons behind judicial actions. While this impulse seems strongest in administrative and parole and pardon issues, basic rationale must apply equally to state appellate courts that should offer guidance to those defendants and their attorneys in preparing a defense for one whose very liberty hangs in the balance. An accused who is denied effective assistance of counsel because of an infringement of the Due Process Clause under these factual circumstances is effectively denied the opportunity to redress any harm caused by state appellate courts.

WHEREFORE, Petitioner, Edgar D. McClure, respectfully requests that this case be returned to the state courts to file a written and sufficient opinion in support of their existing legal determinations.

Respectfully submitted,

SHERRARD, GERMAN & KELLY, P.C.

/s/ James R. Hankle, Esquire

James R. Hankle, Esquire

Attorney for Petitioner,

Edgar D. McClure

35th Floor, FreeMarkets Center

210 Sixth Avenue Building

Pittsburgh, PA 15222-2602

(412) 355-0200

PA I.D. No. 36019

CERTIFICATE OF SERVICE

I, James R. Hankle, Esquire do hereby certify that a true and correct copy of the within **Petition for Writ of Habeas Corpus and Brief in Support of Habeas Corpus Petition** was served on the below listed counsel for the Commonwealth of Pennsylvania via first-class United States mail, postage prepaid, this 6 day of March, 2002:

David W. Addy, Esquire

Gary F. Dobias, Esquire

Assistant District Attorney

Carbon County Courthouse

Two Broadway

Jim Thorpe, PA 18229-0036

/s/ James R. Hankle

James R. Hankle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

May 22, 2002

RE: MCCLURE V. WILSON, ETAL

CA No. 02-1206

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Smith, on this date in the above captioned matter. You are hereby notified that within ten (10) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)).

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P. 53, the procedure under that rule shall be followed.

MICHAEL E. KUNZ
Clerk of Court

By: /s/ Linda V. Jerry
LINDA V. JERRY, Deputy Clerk

cc: Hankle
Addy
Courtroom Deputy to Judge Yohn

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. MCCLURE,	: CIVIL DIVISION
Petitioner	:
VS.	:
HARRY E. WILSON,	:
SUPERINTENDENT, STATE	:
CORRECTIONAL INSTITUTION	:
AT CRESSON, CRESSON, PA, AND	:
THE DISTRICT ATTORNEY OF	:
THE COUNTY OF CARBON, AND	:
THE ATTORNEY GENERAL OF	:
THE STATE OF PENNSYLVANIA,	:
Respondents	:

NO. 02-1206

ORDER

AND NOW, to wit, this day of _____, 2002, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is DENIED and DISMISSED in its entirety.
3. There is no probable cause to issue a certificate of appealability.

It is so ORDERED.

BY THE COURT:

_____

WILLIAM H. YOHN, JR. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. MCCLURE,

CIVIL DIVISION

Petitioner

VS.

HARRY E. WILSON,
SUPERINTENDENT, STATE
CORRECTIONAL INSTITUTION
AT CRESSON, CRESSON, PA, AND
THE DISTRICT ATTORNEY OF
THE COUNTY OF CARBON, AND
THE ATTORNEY GENERAL OF
THE STATE OF PENNSYLVANIA,

Respondents NO. 02-1206

REPORT AND RECOMMENDATION

CHARLES B. SMITH
UNITED STATES MAGISTRATE JUDGE

Currently pending before the Court is a counseled Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. §2254, by a petitioner incarcerated in the State Correctional Institution at Cresson, Pennsylvania. For the reasons which follow, the Court recommends that the Petition be denied and dismissed.

I. PROCEDURAL HISTORY

Following a jury trial in the Carbon County Court of Common Pleas, presided over by the Honorable Richard W. Webb, petitioner was convicted, on June 9, 1998, of five counts of rape, five counts of statutory rape, four counts of involuntary deviate sexual intercourse, nineteen counts of indecent assault, two counts of corruption of minors and two

counts of criminal conspiracy. The charges arose from petitioner's repeated sexual assault of two minor children over the period of several years. According to the evidence presented at trial, petitioner was a friend of the father of the two children and was invited over for purposes of molesting the children, often while the father watched.

Judge Webb sentenced petitioner to an aggregate term of nineteen to thirty years imprisonment. Thereafter, petitioner filed post-sentence motions, as well as supplemental post-sentence motions. The trial court conducted a hearing on the issue of ineffective assistance of trial counsel and, subsequently, by way of Opinion and Order dated November 20, 1998, denied relief. On appeal, the Pennsylvania Superior Court affirmed the judgment of sentence. Commonwealth v. McClure, 745 A.2d 42 (Pa. Super. Ct. 1999). The Pennsylvania Supreme Court thereafter denied allowance of appeal, Commonwealth v. McClure, 749 A.2d 468 (Pa. 2000), and, on June 12, 2000, the United States Supreme Court denied certiorari. McClure v. Pennsylvania, 530 U.S. 1230, 120 S. Ct. 2660 (2000).

Having received no relief on direct appeal, petitioner filed a petition, on January 30, 2001, pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, et seq. Upon the trial court denial of relief, petitioner appealed to the Pennsylvania Superior Court. On September 27, 2001, the Superior Court affirmed the lower court ruling. Petitioner did not seek allocatur from the Pennsylvania Supreme Court.

Petitioner, represented by counsel, filed the instant Petition for Writ of Habeas Corpus, on March 8, 2002, alleging the following grounds for relief:

1. Ineffective assistance of counsel for failing to put petitioner on the stand to testify in his own defense; and

2. Denial of Due Process under the Fourteenth Amendment because the state appellate process failed to provide adequate and specific reasons

> for their rulings in response to a specific allegation of error by the trial counsel.

Considering these claims under the applicable standard of review, we find no basis for granting the writ.

II. STANDARD OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for writ of habeas corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e) (Supp. 2000). The statute also grants significant deference to legal conclusions announced by the state court, as follows:

> An application for a writ of habeas corpus on behalf of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1994).

The United States Supreme Court, in the decision of Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded to state court legal decisions and more clearly defined the two-part analysis set forth in the statute. Williams, 529 U.S. at 404-405. Under the first party of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly

established federal law, as determined by the Supreme Court of the United States." As defined by Justice O'Connor, writing for the majority of the Court on this issue, a state court decision can be contrary to Supreme Court precedent in two ways: 1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that reached by [the Supreme Court]." Id. She explained, however, that this "contrary to" clause does not encompass the "run-of-the mill state-court decisions" applying the correct legal rule from Supreme Court cases to the facts of the prisoner's case." Id. At 406.

To reach such "run-of-the-mill" cases, Justice O'Connor turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1), and found that a state court decision can involve an unreasonable application of Supreme Court precedent: 1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or 2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context should apply." Williams, 529 U.S. at 407-408. The Court specified, however, that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly-established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410.

III. MERITS

A. Ineffective Assistance of Counsel for Improperly Advising Petitioner to Not Take the Stand in His Own Defense

Petitioner first alleges that he has been denied the effective representation of competent counsel due to counsel's

failure to call him to testify on his own behalf. Upon further inquiry into this claim, we find it to be without merit.

The right to have effective assistance of counsel is a fundamental right provided for by the Sixth Amendment of the United States Constitution. In the case of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984), the United States Supreme Court set forth a two-prong test – both of which must be satisfied – by which ineffective assistance of counsel claims are judged. First, petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Strickland, 466 U.S. at 688. The Supreme Court has explained that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164 (1955)). Strategic and tactical decisions are not grounds for an ineffective assistance claim unless counsel displayed "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles." Holland v. Horn, 150 F. Supp. 2d 706, 727 (E.D. Pa. 2001) (quoting Commonwealth of the Virgin Islands v. Weaterwax, 20 F. 3d 572, 579 (3d Cir. 1994)).

The second prong of the test requires petitioner to prove that the allegedly deficient performance actually prejudiced the defense. To do so, petitioner must demonstrate that counsel's errors were so serious as to deprive him/her of a fair trial or a trial whose result is reliable. Strickland, 466

U.S. at 687. In other words, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

As in the case before the Court, an allegation of ineffectiveness may arise from an attorney's failure to call his or her client to the stand in his own defense. A criminal defendant has a constitutional right to testify on his own behalf, a right which may only be waived by the defendant. Rock v. Arkansas, 483 U.S. 44, 50-53, 107 S. Ct. 2704, 2708-2710 (1987); United States v. Pennycooke, 65 F.3d 9, 10 (3d Cir. 1995). Because the right to testify finds its foundation in the Constitution and the mandates of Due Process, a defendant's waiver of that right must be knowing and intelligent. Pennycooke, 65 F.3d at 11. "The duty of providing such advice [on whether to testify] and of ensuring that any waiver is knowing and intelligent rests with defense counsel." Id. at 13. A dual presumption remains, however, that where a defendant is represented by counsel, counsel has presumably discussed the defendant's right to testify with him and defendant voluntarily and intelligently waived that right. United States v. Hatcher, Crim. A. No. 94-173-1, 1997 WL 698488, *3 (E.D. Pa. Nov. 7, 1997) (citing Pennycooke, 65 F.3d at 12-13). Consequently, to succeed on a claim of ineffective assistance for failure to allow defendant to testify, the petitioner must overcome these presumptions. Hatcher, 1997 WL 698488, at *3. Moreover, the petitioner must demonstrate prejudice by putting forth more than just a "bald assertion" that he was not allowed to testify, including some specifics as to what his testimony would have been. Id. (citing Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991); Granada v. United States, 51 F.3d 82, 85 (7th Cir. 1995), cert. Denied, 516 U.S. 1139, 116 S. Ct. 970 (1996)).

Petitioner, in the case at bar, raised this identical ineffectiveness claim to the Pennsylvania state courts who found that counsel had acted in a professional and effective manner by not calling petitioner to the stand. In its written opinion, the state trial court first noted that, although

petitioner would have been given the chance to deny the accusation against him had he testified, his testimony would have opened him up to cross-examination about his admitted sexual relationship with the victims' mother, who was also the purported common law wife of his friend and co-conspirator. Trial Court Opinion, at p. 15. Such evidence would have undermined the defense's claim that petitioner maintained a good character for chastity and respect for family values. The trial court went on to rule that testifying could have also drawn attention to petitioner's repeated visits to the victims' home, as well as has his continued relationship with his co-conspirator, and the victims' father, while the father was in jail on charges of molestation. Finally, the state court recognized that petitioner made his own decision not to testify, after full discussion about the pros and cons of doing so with his attorneys. Id. at 14. Ultimately, the court concluded, in light of these facts, that counsel acted reasonably in not calling him to the stand. Id, at 15.

Rejecting the state court's analysis, petitioner's habeas petition maintains that counsel effectively denied him his right to testify by providing false advice. Specifically, he alleges that trial counsel induced him not to testify by advising him that the Commonwealth, on cross-examination, would have elicited evidence of the consensual sexual liaison between petitioner and the mother of the two victims, thereby undermining his claims of good character. This advice, he argues, was erroneous since, under Pennsylvania Rules of Evidence 608 and 609, any such evidence of his sexual liaison was inadmissible. Because counsel's claimed basis for advising petitioner not to testify clearly constituted a mistake of law, counsel could have had no reasonable strategy for recommending against petitioner's taking the stand.

Additionally, petitioner challenges the trial court's finding that he made his own decision not to testify after consultation. He claims that the consultation was "ambiguous and tentative at best." Brief in Support of Petition for Writ Habeas Corpus, at p. 11. He further maintains that there is no

excuse for the fact that the attorney's understanding and resulting advice was erroneous. Id

Finally, petitioner contends that his attorney's actions worked a substantial prejudice to his defense. The Commonwealth offered only two witnesses – the victims themselves – in support of their case. Had petitioner testified, he would have been able to deny the charges and allow the jury decide his truthfulness. Due to counsel's allegedly improper recommendation, however, the jury had the benefit of hearing only one side of the story.

This Court finds petitioner's analysis to be flawed in several respects. First, petitioner improperly cites Pennsylvania Rules of Evidence 608 and 609 for the proposition that any evidence of his consensual sexual liaison with the mother of the two children was inadmissible and, thus, not a basis for his counsel to advise him not to testify. Quite contrary to petitioner's argument, however, Rule 608(b)(2) provides as follows:

> Except as provided in Rule 609 (relating to evidence of conviction of crime),
>
> (1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,
>
> (2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

PA. R. Evid. 608 (emphasis added). Rule 609 merely expands on Rule 608 to discuss impeachment of a witness by evidence of a crime or conviction. Pa. R. Evid. 609. Thus, the only evidence contemplated by Rules 608 and 609 is that used for purposes of challenging the credibility or truthfulness of a

witness's testimony. Commonwealth v. Harris, 785 A.3d 988, 1000 (Pa. Super. Ct. 2001); 22 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, §5236 (1978).

Where, on the other hand, the character evidence sought to be introduced is substantive evidence of traits relevant to the crime of which the defendant is charged, its admissibility is governed by Pa. R. Evid. 404. Harris, 785 A.2d at 1000. Pennsylvania Rule of Evidence 404(a) states, in pertinent part:

> (a) Character Evidence Generally
>
> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except as follows:
>
> > (1) Character of Accused. In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same.

PA. R. EVID. 404(a)(1) (emphasis added). Pursuant to this rule, the accused in a criminal case may introduce evidence of his own good character in order to suggest the inference that someone with good character would not have committed the crime with which the accused is charged. Government of Virgin Islands v. Grant, 775 F.2d 508, 511 (3d Cir. 1985).

By introducing evidence of his good character, however, the criminal defendant opens himself to rebuttal by proof that his character is bad. See 42 Pa.C.S. §5918 (1982). ("No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked shall be required to answer, any question . . . tending to show that he has been of bad character or reputation unless . . . he shall have at such trial . . . given evidence tending to prove his own good character or reputation"); see also Commonwealth v. Morgan, 739 A.2d 1033, 1036 (Pa. 1999), 22 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §5236 (1978). Pennsylvania Evidence Rule 405 goes on to note that, on

cross-examination of a witness testifying as to character, "inquiry is allowable into relevant specific instances of conduct." Pa. R. Evid. 405. As such, where a defendant has character witnesses testify as to a pertinent trait of his good character, the prosecution may cross-examine that witness or the testifying defendant using specific instances of conduct to rebut the showing of good character. See, e.g., United States v. Polin, 824 F.Supp. 542, 550 (E.D. Pa. 1993) (in trial for defendant on charges of attempting to destroy a building by fire, prosecution was entitled to cross-examine him concerning his failure to file a federal income tax return in 1989, after defendant put on 11 character witnesses to testify as to his reputation as a law-abiding citizen); Commonwealth v. Fisher, 741 A.2d 1234, 1245 (Pa. Super. Ct. 1999) (prosecution could question capital murder defendant regarding tattoo of nickname "Kuda," which referred to a barracuda, and could state that a barracuda was a "nasty evil fish" to rebut inference of good character, where defendant presented testimony of his corrections counselor as to defendant's reputation for being kind and courteous and evidence that he was devoutly religious, and defense counsel characterized defendant as a war hero and a model prisoner); Com. v. Novasak, 606 A.2d 477, 487 (Pa. Super. Ct.), appeal denied, 616 A.2d 984 (Pa. 1997) (once defendant placed his character in issue via his own direct testimony, prosecution was entitled to exploit that opening on cross-examination and in closing).

In the case at bar, petitioner and his counsel presented a defense based primarily on character evidence of petitioner's reputation for chasteness. Defense counsel called no less than three witnesses who testified primarily that petitioner was very chaste and morally responsible, that he was very happy with his family, and that he was unlikely to engage in sex with someone other than his wife. By doing so, petitioner opened the door for rebuttal evidence by the prosecution as to his reputation for chasteness. Had counsel called petitioner to the stand to testify, it would have been permissible for the prosecution to cross-examine him as to this alleged by inquiring into his affair with the mother of the two victims.

Consequently, counsel's recommendation that petitioner not take the stand due to a potentially damaging cross-examination constituted legally correct and strategically sound advice that fell well within the realm of objectively reasonable conduct.

Second, even assuming *arguendo* that the evidence regarding petitioner's consensual affair was inadmissible, counsel's recommendation still rested on sound strategy. As noted by the state court, if petitioner had taken the stand, the prosecution would have had the opportunity to emphasize petitioner's repeated visits to the victims' home and underscore the relationship between petitioner and his co-conspirator – the father of the victims – which continued even after the father was in prison. In light of such a potential threat to the defense case, this fact alone constitutes sufficient justification for counsel's advice to petitioner.

Third and finally, the Court cannot ignore the state court's finding that petitioner made his own decision not to testify after full discussion with his attorneys. Although petitioner argues that his consultation with counsel was "ambiguous" and "tentative", the record belies his claim. At the evidentiary hearing on his post-trial motions, defense counsel testified as follows:

> I would say that we had numerous and I mean numerous discussions on whether or not he should take the stand or not. The last discussion that we had took place, I think, on the Wednesday or Thursday before the trial was to start. I never told Mr. McClure that he should not take the stand. We had numerous discussions on what would happen if he did and didn't take the stand. I believe on the Thursday, the last time that I talked to him, I called him and I said, Ed, we are going to get down to it and we've got to make a decision on whether or not you are going to take the stand. I cannot make this decision for you. I want you to talk it over with Jeanie and then we are going to talk again. I don't want to talk about it on the phone because I want you to talk to your wife about what we

are going to do 'cause she was an integral part of whatever we did.

I was in my daughter, Anita's bedroom sitting on the floor having this discussion with Mr. and Mrs. McClure and my statement, because they were both on the phone, and my statement to them was to go over the pros and cons of testifying and my – one of my statements and I knew it was – you know, you just look at these things as an afterthought. I said to him, if you don't take the stand, I – if you take the stand, I've covered myself but these are the alternatives. You need to make a decision. Their statement was, you are the lawyer, you tell us what to do. I can't tell you what to do.

It came down to he didn't take the stand. Does that mean I told him not to take the stand? No, I don't think so. It is my recollection that we had a long discussion about it. We went over the pros and cons and it came out that he wasn't going to take the stand.

(N.T. 10/19/98, pp. 26-28). Petitioner likewise testified at that hearing and conceded the truth of counsel's representations, as follows:

Q. Now before the trial occurred, did Mr. Garfield ever tell you that you should not take the stand and testify on your own behalf?

A. No, no.

Q. He never told you you should take the stand?

A. Not directly that I should, no. He left it up to my decision. And myself not being a lawyer and like I just made the statement, never been in a courtroom before, it was kind of a wide-open door, a decision that was very hard for me to decide on.

Q. When did he let it up to your decision?

A. Right up until the last few minutes before the Court. He said, there is a possibility that he

might put me on the stand but it was recommended that I not take the stand.

Q. That's what he told you?

A. Yes.

(N.T. 10/19/98, p. 51).

In view of this testimony, petitioner has failed to rebut the presumption that his counsel discussed his right to testify with him and petitioner voluntarily and intelligently waived that right. Hatcher, 1997 WL 698488, at *3. Indeed, petitioner admitted that, based on counsel's advice, he made his own decision not to take the stand. Having already found that counsel's advice was both legally and strategically sound, we cannot conclude that counsel acted ineffectively. In turn, we find no basis for deeming the state court ruling on this issue to be either contrary to or an unreasonable application of federal law.

B. Denial of Due Process Under the Fourteenth Amendment Because the State Appellate Process Failed to Provide Adequate and Specific Reasons for Their Rulings in Response to a Specific Allegation of Error by the Trial Counsel.

Petitioner's second claim for habeas relief challenges not an error at trial, but rather the failure of the state courts to address his appellate arguments, allegedly in violation of the due process clause. More specifically, petitioner contends that throughout his state appeals, he consistently argued that counsel improperly advised him that he should not testify due to the threat of cross-examination regarding his affair with the victim's mother. Despite his repeated recitation of Pennsylvania Rules of Evidence 608 and 609 in support of his position, the state courts simply denied his claims without ever analyzing the impact of these rules. Accordingly, he now contends that the state judiciary failed to adjudicate the meanings of its own rulings which had "the direct effect of blinding appellate counsel in his ethical ability to properly advise his client as to appeals and appellate strategy . . ." Brief in Support Petition for Writ of Habeas Corpus, at p. 6.

Throughout his five pages of counseled argument, however, petitioner disregards the fact that the state courts did provide a thorough explanation for why his ineffective assistance of counsel claim lacked merit. Indeed, the Court held a lengthy evidentiary hearing and ultimately explained, via a written opinion, that counsel acted effectively in not calling petitioner to the stand based on (1) his relationship with the victims' family, (2) the character defense and petitioner's affair with the victims' mother; and (3) the fact that the decision was left to petitioner's discretion after full discussion with his trial attorneys.

Petitioner remains focused on the mere fact that the trial court did not address his argument under Rules 608 and 609 of the Pennsylvania Rules of Evidence. As set forth in detail above, however, Rules 608 and 609 simply do not apply to this case.[4] Sitting as a court of review, we cannot now fault the state courts for refusing to discuss a completely irrelevant and meritless argument raised by petitioner. Certainly, the actions of the state court were neither contrary to nor an unreasonable application of federal law. Consequently, we decline to award habeas relief on this ground.

Therefore, I make the following:

---

[4] Petitioner, apparently aware of the controlling nature of Rule 404 on the admissibility of the evidence, argues that Rule 404(a)(3), entitled "Character of Witness, specifically refers to the applicability of Rules 608 and 609 by providing that "[e]vidence of a pertinent trial of character of a witness is admissible as provided in . . . 608 (character and conduct of a witness) and 609 (evidence of conviction of crime)." Pa. R. Evid. 404(a)(3). What petitioner misunderstands, however, is that it is not section (a)(3) of Rule 404 that applies, but rather section (a)(1), entitled "Character of Accused." This latter section makes absolutely no reference to Rules 608 and 609, further underscoring the fact that they do not apply in this case.

RECOMMENDATION

AND NOW, this 21st day of May, 2002, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus be DENIED AND DISMISSED. There is no probable cause to issue a certificate of appealability.

/s/ Charles B. Smith
CHARLES B. SMITH
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE, CA No. 02-1206
Petitioner, FILED JUNE 7, 2002
v.
HARRY E. WILSON, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION
AT CRESSON, PENNSYLVANIA, AND
THE DISTRICT ATTORNEY OF THE

COUNTY OF CARBON, AND
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA,
Respondents.

OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE CHARLES B. SMITH

JAMES R. HANKLE, ESQUIRE
PA I.D. NO. 36019
SHERRARD, GERMAN
& KELLY, P.C.
35th Floor, FreeMarkets Center
Pittsburgh, PA 15222-2602
Firm No: 006
Attorney for Petitioner,
Edgar D. McClure

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE, CA No. 02-1206
Petitioner,
v.
HARRY E. WILSON, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION AT
CRESSON, PENNSYLVANIA, AND
THE DISTRICT ATTORNEY OF
THE COUNTY OF CARBON, AND
THE ATTORNEY GENERAL
OF THE STATE OF PENNSYLVANIA,
Respondents.

OBJECTIONS TO REPORT AND RECOMMENDATION OF

MAGISTRATE JUDGE CHARLES B. SMITH

I. STATEMENT OF THE CASE AND STANDARD OF REVIEW

The Report and Recommendation of Magistrate Judge Charles B. Smith accurately states the relevant procedural history of the case, except in characterizing the direct appeals being taken by Petitioner, Edgar D. McClure (hereinafter "Petitioner"), as having been taken simply because no relief was received. The trial court did not address Petitioner's argument, and each appellate court either "rubber stamped" the lower court or refused to hear the appeal. The Report and Recommendation amply states the law governing a petition for habeas corpus, and is consistent with Petitioner's Statement of the Standard of Review in his Brief in Support of Habeas Corpus Petition.

II. OBJECTIONS TO MAGISTRATE REPORT AND RECOMMENDATION

A. Trial counsel was ineffective by failing to have Petitioner testify on his own behalf.

The Report and Recommendation concludes that because Petitioner introduced evidence of his good character, the error by counsel was irrelevant because the introduction of character evidence opened Petitioner to rebuttal by proof of bad character with specific instances of conduct. This conclusion was reached regardless of the fact that Petitioner's trial counsel admitted to an error in understanding the Pennsylvania Rules of Evidence governing the use of character evidence to impeach a criminal defendant when testifying, with this error dictating the trial strategy to use only character evidence as a defense. The Magistrate misunderstands Petitioner's argument by focusing on impeachment of the character witnesses by specific instances of conduct, not on the error of trial counsel in not having Petitioner testify independent of the character witnesses. Petitioner's argument is not that trial counsel made an error in not having Petitioner testify once trial counsel had put all three character witnesses on the stand. At that point there is no question that trial counsel could not put Petitioner on the stand because Petitioner could then have been questioned about his consensual sexual liaison with the mother of the two victims.

Trial counsel made the fundamental error of choosing not to put Petitioner on the stand to testify in his own defense under the mistaken belief that he could be questioned about this consensual sexual liaison with the victims' mother. Operating under this mistaken belief, trial counsel had no other defense at that point except to put on character evidence. The flaw in the reasoning in the Report and Recommendation goes one step further because to adopt the Magistrate's reasoning is to adopt the assumption that but for trial counsel's misunderstanding of the rules of evidence governing character evidence, trial counsel would have utilized character witnesses in the defense to testify in a manner which would open up the

door to cross-examination on the consensual sexual liaison. This assumption is not supported by the record, and the Report and Recommendation does not cite to any testimony or case law for this.

The reasoning in the Report and Recommendation ignores the testimony given by the lead trial counsel, Michael Garfield. On cross-examination by David W. Addy, Esquire, Assistant District Attorney for Carbon County, Mr. Garfield admitted that one of the factors in his reasoning for not putting Petitioner on the stand was because of his admissions of having a consensual sexual liaison with Susan O'Neill, a person who is not his wife, and based upon trial counsel's belief that if Petitioner took the witness stand, the Commonwealth would cross-examine him on his admissions to the police of having the consensual sexual liaison. The testimony from the transcript is set forth below:

> Q Did you explain to him that if he took the witness stand that the Commonwealth would most likely cross-examine him on that statement?
>
> A Yes, and I had already talked to Susan O'Neill about this and also to, I think, the boy was there that day when she talked about the relationship that she and he had so I knew that, you know -- and I just knew Ed would tell the truth once he got on the stand because he always told me the truth in regard to all those other things about being there and all so --

(N.T. 10/19/98, pp. 42-43).

As the Report and Recommendation correctly notes, until evidence of good character is admitted, cross-examination into relevant specific instances of conduct to rebut proof of good character is not admissible. This is where the prejudicial error was made, by mounting a defense that did not include Petitioner testifying on his own behalf, not once the character witnesses had testified, at which point had Petitioner taken the stand he would be exposed cross-

examination. Interestingly, the prosecution could have also cross-examined Petitioner's character witnesses about Petitioner's statements to the police of having a prior consensual sexual liaison with Susan O'Neill, but did not do so. If the statements by Petitioner of the consensual sexual liaison were so damaging, why were they not used by the prosecution?

This error by trial counsel was corroborated by Petitioner's second chair counsel, Robert Yurchak, Esquire, again on cross-examination by Mr. Addy, wherein Mr. Yurchak testified that they believed that putting Petitioner on the witness stand, independent of and without regard for the use of character evidence, would have opened Petitioner to cross-examination about his statements regarding the consensual sexual liaison with Susan O'Neill. Mr. Yurchak testified:

> Q Would putting Mr. McClure on the witness stand have opened him up to the statement that he made about Susan O'Neill?
>
> A We felt it would.

(N.T. 10/19/98, p 19).

Mr. Yurchak also confirmed this on re-direct examination by the undersigned counsel:

> Q And with regard to Mrs. O'Neill, you felt that the fact that that may come out would have been damaging to him, is that correct?
>
> A That is one of the factors we considered, yes.

(N.T. 10/19/98, p. 20).

The Report and Recommendation also concludes that trial counsel's recommendation rested on sound strategy because had Petitioner taken the stand to testify, the prosecutor could have emphasized Petitioner's repeated visits to the home and underscored the friendship between Petitioner and the father of the victims. Labeling this evidence as a "threat" is not an objective view of the evidence, as such evidence is clearly a double edged sword. As was repeatedly

stated in the record of the hearing, there was no real question as to whether or not the two victims knew who Petitioner was. The question was whether Petitioner committed the acts alleged, and in that regard, whether the victims identification of Petitioner as one of the perpetrators was accurate or simply the product of their familiarity with Petitioner as a result of Petitioner's friendship with the victim's father. While it is true that evidence of Petitioner's presence in the home could corroborate the victims identification, failing to address the fact that the victims could identify Petitioner created a far graver threat by not explaining the victims first hand identification of Petitioner. This is arguably a far greater risk as first hand identification testimony is very powerful. At a minimum, although it is possible to endlessly debate the pros and cons of leaving a victim's first hand identification entirely unexplained, and by not providing a non-criminal reason for why the alleged victims could identify Petitioner, this evidence is a double edge sword which neither should weigh in favor nor against trial counsel's effectiveness at trial.

The third and final basis asserted by the Report and Recommendation is the Magistrate's conclusion that Petitioner made his own decision not to take the stand. Not only does this ignore the testimony of the trial counsel at the hearing, but the excerpted "smoking gun" text from Petitioner's testimony at the hearing fails to include the key follow-up questions, and fails to give full credit to the quoted text by simply picking and choosing what is favorable to the conclusion that Petitioner made his own decision not to take the stand. Regarding the testimony of Petitioner quoted on Pages 15 and 16 of the Report and Recommendation, the Magistrate fails to address Petitioner's testimony on Page 51 wherein he stated ". . . but it was recommended that I not take the stand when asked about trial counsel's recommendations." (N.T. 10/19/98, p. 51). The two follow-up questions and answers which the Report and Recommendation omits are as follows:

Q Did he ever prepare you to take the stand?

A No, sir, he did not.

Q And was that because you told him you wouldn't take the stand, you didn't want to take the stand?

A I never said I would not take the stand. I never made a decision either way.

(N.T. 10/19/98, pp. 51-52).

To put what the Report and Recommendation characterizes as a knowing decision not to testify into perspective, a decision which lead trial counsel could not testify that Petitioner made, and which Petitioner testified he did not make, is the uncontested fact that Petitioner was never prepared by trial counsel to testify. (N.T. 10/19/98, pp. 28-29) (Garfield didn't prepare Petitioner to testify), (N.T. 10/19/98, p. 51) (same). Petitioner never make any decision not to testify and in fact was never prepared to testify by his trial counsel. Further, trial counsel admitted that they in fact recommended that Petitioner not testify. (N.T. 10/19/98, p. 6, p. 28, pp. 29-30). The advice of trial counsel to Petitioner not to testify was corroborated by Petitioner wherein he testified that Mr. Garfield told him that he didn't want to put Petitioner on the stand (N.T. 10/19/98, p. 52), and Petitioner's wife, wherein she testified that Mr. Garfield had been telling them all along that it was not a good idea for Petitioner to testify in his own defense. (H.T. 10/19/98, p. 59). This illustrates the fact that Petitioner not testifying was an act of trial counsel, not a decision by Petitioner. This is not a well-reasoned decision reached after full consultation with trial counsel, this is an unsophisticated client who had never been on trial before who was not called to testify on his own behalf because his trial counsel did not understand the rules of evidence governing character evidence.

In summary, the Magistrate's Report and Recommendation misses the point that the error made by trial counsel in understanding the cross-examination of Petitioner and the Rules of Evidence governing character evidence was made at the time when the decision not to have Petitioner to testify in his own behalf occurred, not when trial counsel for Petitioner had already put on three character witnesses to

testify on Petitioner's behalf. The fundamental flaw in the reasoning in the Report and Recommendation is the assumption that had trial counsel not misunderstood the Rules of Evidence governing character evidence, trial counsel would have still put on three character witnesses. This is incorrect and unsupported by the record. When trial counsel devised the strategy, operating under the mistaken belief that putting Petitioner on the stand would automatically open him up to cross-examination on the consensual sexual liaison, trial counsel's only remaining defense was to use character evidence. The fundamental errors made by trial counsel cannot be rectified once the character witnesses were allowed to testify.

B. The Report and Recommendation fails to addresses Petitioner's argument.

As set forth in Issue A, trial counsel's plain error in misunderstanding the rules of character evidence governing the admissibility and use of character evidence, which then led trial counsel to not have Petitioner testify on his own behalf is the error complained of. The Report and Recommendation focuses only on trial counsel's decision not to have Petitioner testify once the character witnesses had testified, and wholly ignores the plain error made by trial counsel which trial counsel admitted to under oath at the hearing. As with the trial court, the Report and Recommendation does not address this argument, and thus did not explain why trial counsel acted effectively to rebut Petitioner's claims of ineffective assistance of counsel.

The Magistrate's misunderstanding of the argument is plainly shown by the extensive discussion of allowable cross examination of character witnesses, and the erroneous conclusion that Pa. R.E. 608 and 609 "simply do not apply to this case" (Report and Recommendation, p. 18). Rules 608 and 609 specifically govern the use of character evidence and conviction of a crime to impeach a witness, in this case, Petitioner. It is precisely these two rules which trial counsel failed to understand would preclude the cross examination of Petitioner about the consensual sexual liaison with the mother

of the two victims. Petitioner stands on his arguments as set forth in the Brief in Support of Habeas Corpus Petition, and the cases cited therein.

CONCLUSION

WHEREFORE, Petitioner, Edgar D. McClure, respectfully requests that this Honorable Court hold a hearing on the issue of whether Petitioner is entitled to a new trial, and Order that this case be returned to the State courts to file a written sufficient opinion in support of their legal determinations.

Respectfully submitted,
SHERRARD, GERMAN
& KELLY, P.C.

/s/ James R. Hankle
James R. Hankle, Esquire
Attorney for Petitioner,
Edgar D. McClure
35th Floor, FreeMarkets Center
210 Sixth Avenue Building
Pittsburgh, PA 15222-2602
(412) 355-0200
PA I.D. No. 36019

CERTIFICATE OF SERVICE

I, James R. Hankle, Esquire do hereby certify that a true and correct copy of the within **Objections to Report and Recommendation of Magistrate Judge Charles B. Smith** was served on the below listed counsel for the Commonwealth of Pennsylvania via first-class United States mail, postage prepaid, this 6 day of June, 2002:

David W. Addy, Esquire
Gary F. Dobias, Esquire
Assistant District Attorney
Carbon County Courthouse
Two Broadway
Jim Thorpe, PA 18229-0036

/s/ James R. Hankle
James R. Hankle

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE,	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION
HARRY E. WILSON,	:	No. 02-1206
Superintendent, State	:	
Correctional Institution at	:	
Cresson, Cresson, PA, and	:	
THE DISTRICT	:	
ATTORNEY of the County	:	
of Carbon, and THE	:	
ATTORNEY GENERAL	:	
of Pennsylvania	:	
	:	
Respondents.	:	

Memorandum and Order

YOHN, J. February 4, 2003

Edgar J. McClure ("petitioner") has filed a petition for writ of habeas corpus pursuant to 28 U.S.C.A. §2254 (Supp. 2002). The magistrate judge thoroughly and competently addressed the merits of the issues raised in this petition. Petitioner, however raised a new issue for the first time in the objections that he filed in response to the magistrate judge's report. For the reasons explained below, the court will adopt the magistrate judge's report as to the exhausted issues properly raised in the petition and will not address the merits of the issue raised anew in petitioner's objections.

I. Procedural History

As the magistrate judge's report provides a detailed explanation of the procedural background of this case, I will only briefly review the procedure that is relevant to the issues discussed here. After conviction in state court of various offenses on June 12, 1998, petitioner sought relief on direct appeal. Subsequently he sought relief with the trial court and Pennsylvania Superior Court pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §9541, *et seq*. (Purdon's 1998). He was then denied writ of certiorari by the United States Supreme Court on June 12, 2000. On March 8, 2002, petitioner filed the current Petition for Writ of Habeas Corpus. In this petition, as in all prior post-conviction proceedings, petitioner asserted two bases for relief, generally: (1) ineffective assistance of counsel and (2) denial of due process under the Fourteenth Amendment.

On April 5th, 2000, this case was randomly assigned to Magistrate Judge Charles B. Smith. The magistrate judge has filed a report and recommendation in response to which petitioner filed Objections to the Report and Recommendation of Magistrate Judge.

II. Current Procedural Issues

After reviewing petitioner's arguments throughout the post-conviction proceedings, to the extent that they are disclosed in the record, the court concludes that petitioner has raised a new issue in his objections to the magistrate judge's report. Consequently, the new issue has not been exhausted because no state court has had the opportunity to address the issue. However, because I find that this issue is now procedurally barred from state court consideration, it is proper to address the merits of those claims that have been exhausted and properly brought before this court.

Petitioner's original argument, that which he presented to the state court on collateral attack of his conviction, and to the federal court in his habeas petition, is the following: petitioner's trial counsel were ineffective for wrongly

believing that should the accused testify in his defense, the rules of evidence would permit the prosecutor to cross-examine him regarding his sexual relationship with the victims' mother, a mistake of law that persuaded both them and petitioner that he should not take the stand. Hab. Pet. at 2, 3, 10-11.

In contrast, petitioner argues for the first time in his objections to the report, the following: petitioner's trial counsel were ineffective for wrongly believing that should the accused testify in his defense *regardless of whether the defense presented positive character evidence*, the rules of evidence would permit the prosecutor to cross-examine him regarding his sexual relationship with the victims' mother, a mistake of law that persuaded both them and petitioner that he should not take the stand. Obj. to Mag. Rep. at 2.

The novel spin placed on petitioner's argument is determinative. In the context of this case, the attorneys were correct as to the law once they and the accused had decided to present character evidence, which they did. Opin. and Order of Tr. Ct. Post-Conv. at 12. ("the trial attorneys . . .testified credibly to discussing the possible defenses with McClure [petitioner]. Ultimately, a character defense was chosen"). Yet, if the trial attorneys believed what petitioner now claims they did, and this misconception motivated petitioner's decision not to testify, then the attorneys may have been incorrect as to the law. Accordingly, this is a different issue than those raised in the post-conviction state proceedings and in petitioner's federal petition and one for which no factual or legal basis is presented in the record before the court.[5]

---

[5] Additionally, petitioner's initial argument relied entirely upon the argument that the "Pennsylvania Rules of Evidence 608 and 609 govern this case and would have barred the admission of the evidence of the consensual liaison between [p]etitioner and the mother . . .." These rules are wholly inapplicable to the issue of cross-examination of an accused for purposes of rebutting good character evidence. Mag. Rep. and Recom., at 10-14 (explaining how Pa.R.E. 404(a)(1), and *not* 608 and 609 applies to permit this evidence only as rebuttal).

Although petitioner asserts in his objections that the magistrate judge, and apparently every other judge who has addressed petitioner's

It appears that the issue of how to properly treat an issue raised anew in a habeas petitioner's objections to a magistrate judge's report is a novel one that has not yet reached our court of appeals. The majority of district courts in our circuit, as well as other circuit courts, that have addressed this issue have concluded that such issues are not properly before the court, and thus are not to be addressed. *See, e.g., Cohen v. Horn*, 1998 WL 834101, at *6 (E.D. Pa. Dec. 2, 1998); *Hammock v. Vaughn*, 1998 WL 163194, at *1 (E.D. Pa. April 7, 1998); *Martinez v. United States of America*, 1995 WL 572913, at n.9 (E.D. Pa. Sept. 28, 1995); *see also Bolar v. Blodgett*, 1994 WL 374194 (9th Cir. 1994) (holding that district court was not required to consider a new claim raised first in petitioner's objections while it considered the issues properly raised earlier in the habeas proceedings on the merits); *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992) ("[petitioner] first argued these issues in his objections to the magistrate judge's findings, conclusions, and recommendations. These issues were not properly before the district court, therefore this court will not address them."); *but see Maloy v. Zimmerman*, 1987 WL 8823, at 3 (acknowledging that petitioner raised issue anew in his objections, however addressing it and deciding it was without merit).

As a sister circuit articulated, "[t]he purpose of the Magistrate's Act would be frustrated if we were to require a district court to consider a claim presented for the first time after the party has fully litigated his claims before the magistrate judge and found that they were unsuccessful." *Bolar*, 1994 WL 374194, at *1. Given the present lack of

---

post-conviction motions, "misunderstands" his argument, no fair and reasonable reading of petitioner's federal habeas petition could reflect the position that petitioner has posited in his objections. Obj. to Mag. Rep. at 2. Accordingly, even if petitioner did intend this argument in his petition, a proposition that I find highly improbable, he failed to make it. The court is not, nor is it required to be, prescient. Regardless, however, the decision I make today does not depend on such distinctions because this new issue, either because petitioner failed to raise it or failed to make it sufficiently clear to be addressed by a court, is unexhausted.

binding precedential guidance, I will join the majority of other courts that have addressed this issue and conclude that prudence dictates that I consider the newly raised issue as not properly before the court. As a result, only those issues properly raised in the habeas petition shall be considered on their merits.

Even if it were proper to consider this newly raised issue as properly before the court, it would still be appropriate to consider only those issues raised in the petition, albeit for a different reason. It cannot be gainsaid that this newly raised issue is unexhausted.[6] Although generally a court should dismiss in its entirety a petition that involves an unexhausted issue such is not the case where that unexhausted issue is procedurally defaulted at the state level.[7] Such procedural default occurs when "the state law clearly forecloses state court review of claims which have not previously been presented to state court." *Lines*, 208 F.3d at 163. Once

---

[6] Despite the fact that respondent negligently failed to raise the issue of petitioner's failure to exhaust his state remedies, this court will not presume the issue waived. 28 U.S.C.A. §2254(b)(3) (Supp. 2002) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance on the requirement unless the State, through counsel, expressly waives the requirement.") The Supreme Court, in the context of such negligence, has explained that "[t]he State's omission in such a case makes it appropriate for the court . .to take a fresh look at the [exhaustion] issue." *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Accordingly, having raised *sua sponte* this important issue, this court concludes that petitioner failed to exhaust the newly raised issue because the state courts have never had the opportunity to address it.

[7] Typically, habeas corpus petitions that are "mixed" in that they contain exhausted and unexhausted claims must be dismissed. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Governing the present case, however, our court of appeals has held that "[a] petition containing unexhausted but procedurally barred claims in addition to exhausted claims is not a mixed petition requiring dismissal under *Rose* . . . because exhaustion is not possible." *Toulson v. Beyer*, 987 F.2d 984, 987 (3d. Cir. 1993) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) and *Castille v. Peoples*, 489 U.S. 346, 351 (1989)); *see Lines v. Larkins*, 208 F.3d 153, 162-66 (3d. Cir. 2000) ((applying this exception); *Lambert v. Blackwell*, 134 F.3d, 506, 517-519 (1998) (same).

procedural default has been shown as to an unexhausted claim, the court may only consider that claim on its merits if petitioner demonstrates either "cause and prejudice" or "fundamental miscarriage of justice." *Lines v. Larkins*, 208 F.3d 153, 160 (2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Regardless of whether the unexhausted procedurally defaulted issue may be considered, the district court "must decide the merits of the claims that are exhausted and not barred." *Toulson v. Beyer*, 987 F.2d 984, 987 (3d. Cir. 1993).

The issue that petitioner raised for the first time in his objections to the magistrate judge's report is procedurally defaulted in Pennsylvania's courts because it would be untimely. Pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment become final. . ." 42 Pa. Cons. Stat. Ann. §§9545(b)(1) (Purdon's 1998). A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." §9545(b)(3); *see Commonwealth v. Banks*, 726 A.2d 374, 375-76 (making clear after some confusion in the state caselaw that the one-year limitation applies to all PCRA petitioner including second petitions, regardless of when the first was filed and regardless of the capital nature of case); *see also Lines*, 208 F.3d at 164-65 (applying this one year limit to show that issue was procedurally defaulted at the state level to warrant analysis of the exhausted claims on their merits).

Petitioner McClure was convicted on June 9, 1998. On direct appeal, the trial court denied relief. Then, the Pennsylvania Superior Court affirmed the judgment on sentence, and the Pennsylvania Supreme Court denied allowance of appeal. Finally, the United States Supreme Court denied certiorari on June 12, 2000, signifying the finality of the judgment against petitioner for purposes of the PCRA. Accordingly, petitioner's one year opportunity for

filing PCRA petitions expired on June 12, 2001. Consequently, he is now procedurally barred from filing a petition under the PCRA asserting the issue he has just raised in his objections to the magistrate judge's report.[8] Moreover, petitioner has never alleged "cause and prejudice" or "miscarriage of justice"; therefore, this court may not consider his newly raised issue on its merits.

Conversely, the exhausted issues properly raised in the federal habeas petition must be addressed. As stated above, the magistrate judge conducted a thorough and compelling review of these issues. Therefore, I will adopt that report and deny the pending petition for writ of habeas corpus.

---

[8] There are three statutory exceptions to this one-year limitation, however none apply here. Untimeliness may be excused if a petitioner proves one of three enumerated reasons for his failure to raise this issue in a timely fashion. §9545(b)(1). Yet, petitioner cannot now argue that any of these apply to him because he adamantly asserts that he *did* raise this issue in a timely fashion throughout direct and collateral appeal; he argues that the courts have simply misunderstood his position. Obj. to Mag. Rep. at 2. As such, it would be wholly disingenuous to now assert that he *did not* bring it before, but he has a good reason for it. Therefore, this unexhausted issue is subject to procedural default.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE,	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION
HARRY E. WILSON,	:	No. 02-1206
Superintendent, State	:	
Correctional Institution at	:	
Cresson, Cresson, PA, and	:	
THE DISTRICT	:	
ATTORNEY of the County	:	
of Carbon, and THE	:	
ATTORNEY GENERAL	:	
of Pennsylvania	:	
	:	
Respondents.	:	

ORDER

And now on this 4th day of February, 2003, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, is DENIED and DISMISSED.

4. As petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

/s/ William H. Yohn, Jr.

William H. Yohn, Jr., Judge

FILED MARCH 5, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE, CIVIL ACTION
Petitioner, NO. 02-1206

NOTICE OF APPEAL

HARRY E. WILSON,
SUPERINTENDENT,
STATE CORRECTIONAL
INSTITUTION AT CRESSON,
PENNSYLVANIA, and THE
DISTRICT ATTORNEY OF
THE COUNTY OF CARBON,
and THE ATTORNEY
GENERAL OF THE STATE
OF PENNSYLVANIA
Respondents.

Filed on behalf of
Petitioner, Edgar D.
McClure
Counsel of Record for this Party:
James R. Hankle, Esquire
35th Floor, FreeMarkets Center
Pittsburgh, PA 15222-2602
(412) 355-0200
Firm No. 006

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE, Petitioner, v. HARRY E. WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, PENNSYLVANIA, and THE DISTRICT ATTORNEY OF THE COUNTY OF CARBON, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.

CIVIL ACTION NO. 02-1206

NOTICE OF APPEAL

Notice is hereby given that Edgar D. McClure, Petitioner, in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the Memorandum and Order entered in this action on the 4th day of February, 2003. (A copy of the Memorandum and Order is attached hereto).

Respectfully submitted,

SHERRARD, GERMAN & KELLY, P.C.

/s/ James R. Hankle

James R. Hankle, Esquire
Attorney for Plaintiff
PA I.D. No. 36019
35th Floor, FreeMarkets Center
Pittsburgh, PA 15222-2602
(412) 355-0200

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE,	:	
Petitioner,	:	
v.	:	CIVIL ACTION
HARRY E. WILSON,	:	No. 02-1206
Superintendent, State	:	
Correctional Institution at	:	
Cresson, Cresson, PA, and	:	
THE DISTRICT	:	
ATTORNEY of the County	:	
of Carbon, and THE	:	
ATTORNEY GENERAL	:	
of Pennsylvania	:	
	:	
Respondents.	:	

Memorandum and Order

YOHN, J. February 4, 2003

Edgar J. McClure ("petitioner") has filed a petition for writ of habeas corpus pursuant to 28 U.S.C.A. §2254 (Supp. 2002). The magistrate judge thoroughly and competently addressed the merits of the issues raised in this petition. Petitioner, however raised a new issue for the first time in the objections that he filed in response to the magistrate judge's report. For the reasons explained below, the court will adopt the magistrate judge's report as to the exhausted issues properly raised in the petition and will not address the merits of the issue raised anew in petitioner's objections.

I. Procedural History

As the magistrate judge's report provides a detailed explanation of the procedural background of this case, I will only briefly review the procedure that is relevant to the issues discussed here. After conviction in state court of various offenses on June 12, 1998, petitioner sought relief on direct appeal. Subsequently he sought relief with the trial court and Pennsylvania Superior Court pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §9541, *et seq*. (Purdon's 1998). He was then denied writ of certiorari by the United States Supreme Court on June 12, 2000. On March 8, 2002, petitioner filed the current Petition for Writ of Habeas Corpus. In this petition, as in all prior post-conviction proceedings, petitioner asserted two bases for relief, generally: (1) ineffective assistance of counsel and (2) denial of due process under the Fourteenth Amendment.

On April 5th, 2000, this case was randomly assigned to Magistrate Judge Charles B. Smith. The magistrate judge has filed a report and recommendation in response to which petitioner filed Objections to the Report and Recommendation of Magistrate Judge.

II. Current Procedural Issues

After reviewing petitioner's arguments throughout the post-conviction proceedings, to the extent that they are disclosed in the record, the court concludes that petitioner has raised a new issue in his objections to the magistrate judge's report. Consequently, the new issue has not been exhausted because no state court has had the opportunity to address the issue. However, because I find that this issue is now procedurally barred from state court consideration, it is proper to address the merits of those claims that have been exhausted and properly brought before this court.

Petitioner's original argument, that which he presented to the state court on collateral attack of his conviction, and to the federal court in his habeas petition, is the following: petitioner's trial counsel were ineffective for wrongly believing that should the accused testify in his defense, the

rules of evidence would permit the prosecutor to cross-examine him regarding his sexual relationship with the victims' mother, a mistake of law that persuaded both them and petitioner that he should not take the stand. Hab. Pet. at 2, 3, 10-11.

In contrast, petitioner argues for the first time in his objections to the report, the following: petitioner's trial counsel were ineffective for wrongly believing that should the accused testify in his defense *regardless of whether the defense presented positive character evidence*, the rules of evidence would permit the prosecutor to cross-examine him regarding his sexual relationship with the victims' mother, a mistake of law that persuaded both them and petitioner that he should not take the stand. Obj. to Mag. Rep. at 2.

The novel spin placed on petitioner's argument is determinative. In the context of this case, the attorneys were correct as to the law once they and the accused had decided to present character evidence, which they did. Opin. and Order of Tr. Ct. Post-Conv. at 12. ("the trial attorneys . . .testified credibly to discussing the possible defenses with McClure [petitioner]. Ultimately, a character defense was chosen"). Yet, if the trial attorneys believed what petitioner now claims they did, and this misconception motivated petitioner's decision not to testify, then the attorneys may have been incorrect as to the law. Accordingly, this is a different issue than those raised in the post-conviction state proceedings and in petitioner's federal petition and one for which no factual or legal basis is presented in the record before the court.[9]

---

[9] Additionally, petitioner's initial argument relied entirely upon the argument that the "Pennsylvania Rules of Evidence 608 and 609 govern this case and would have barred the admission of the evidence of the consensual liaison between [p]etitioner and the mother . . .." These rules are wholly inapplicable to the issue of cross-examination of an accused for purposes of rebutting good character evidence. Mag. Rep. and Recom., at 10-14 (explaining how Pa.R.E. 404(a)(1), and *not* 608 and 609 applies to permit this evidence only as rebuttal).

Although petitioner asserts in his objections that the magistrate judge, and apparently every other judge who has addressed petitioner's post-conviction motions, "misunderstands" his argument, no fair and

It appears that the issue of how to properly treat an issue raised anew in a habeas petitioner's objections to a magistrate judge's report is a novel one that has not yet reached our court of appeals. The majority of district courts in our circuit, as well as other circuit courts, that have addressed this issue have concluded that such issues are not properly before the court, and thus are not to be addressed. *See, e.g., Cohen v. Horn*, 1998 WL 834101, at *6 (E.D. Pa. Dec. 2, 1998); *Hammock v. Vaughn*, 1998 WL 163194, at *1 (E.D. Pa. April 7, 1998); *Martinez v. United States of America*, 1995 WL 572913, at n.9 (E.D. Pa. Sept. 28, 1995); *see also Bolar v. Blodgett*, 1994 WL 374194 (9th Cir. 1994) (holding that district court was not required to consider a new claim raised first in petitioner's objections while it considered the issues properly raised earlier in the habeas proceedings on the merits); *United States v. Armstrong*, 951 F.2d 626, 630 (5th Cir. 1992) ("[petitioner] first argued these issues in his objections to the magistrate judge's findings, conclusions, and recommendations. These issues were not properly before the district court, therefore this court will not address them."); *but see Maloy v. Zimmerman*, 1987 WL 8823, at 3 (acknowledging that petitioner raised issue anew in his objections, however addressing it and deciding it was without merit).

As a sister circuit articulated, "[t]he purpose of the Magistrate's Act would be frustrated if we were to require a district court to consider a claim presented for the first time after the party has fully litigated his claims before the magistrate judge and found that they were unsuccessful." *Bolar*, 1994 WL 374194, at *1. Given the present lack of binding precedential guidance, I will join the majority of other

---

reasonable reading of petitioner's federal habeas petition could reflect the position that petitioner has posited in his objections. Obj. to Mag. Rep. at 2. Accordingly, even if petitioner did intend this argument in his petition, a proposition that I find highly improbable, he failed to make it. The court is not, nor is it required to be, prescient. Regardless, however, the decision I make today does not depend on such distinctions because this new issue, either because petitioner failed to raise it or failed to make it sufficiently clear to be addressed by a court, is unexhausted.

courts that have addressed this issue and conclude that prudence dictates that I consider the newly raised issue as not properly before the court. As a result, only those issues properly raised in the habeas petition shall be considered on their merits.

Even if it were proper to consider this newly raised issue as properly before the court, it would still be appropriate to consider only those issues raised in the petition, albeit for a different reason. It cannot be gainsaid that this newly raised issue is unexhausted.[10] Although generally a court should dismiss in its entirety a petition that involves an unexhausted issue such is not the case where that unexhausted issue is procedurally defaulted at the state level.[11] Such procedural default occurs when "the state law clearly forecloses state court review of claims which have not previously been presented to state court." *Lines*, 208 F.3d at 163. Once procedural default has been shown as to an unexhausted

---

[10] Despite the fact that respondent negligently failed to raise the issue of petitioner's failure to exhaust his state remedies, this court will not presume the issue waived. 28 U.S.C.A. §2254(b)(3) (Supp. 2002) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance on the requirement unless the State, through counsel, expressly waives the requirement.") The Supreme Court, in the context of such negligence, has explained that "[t]he State's omission in such a case makes it appropriate for the court . .to take a fresh look at the [exhaustion] issue." *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Accordingly, having raised *sua sponte* this important issue, this court concludes that petitioner failed to exhaust the newly raised issue because the state courts have never had the opportunity to address it.

[11] Typically, habeas corpus petitions that are "mixed" in that they contain exhausted and unexhausted claims must be dismissed. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). Governing the present case, however, our court of appeals has held that "[a] petition containing unexhausted but procedurally barred claims in addition to exhausted claims is not a mixed petition requiring dismissal under *Rose* . . . because exhaustion is not possible." *Toulson v. Beyer*, 987 F.2d 984, 987 (3d. Cir. 1993) (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) and *Castille v. Peoples*, 489 U.S. 346, 351 (1989)); *see Lines v. Larkins*, 208 F.3d 153, 162-66 (3d. Cir. 2000) (applying this exception); *Lambert v. Blackwell*, 134 F.3d, 506, 517-519 (1998) (same).

claim, the court may only consider that claim on its merits if petitioner demonstrates either "cause and prejudice" or "fundamental miscarriage of justice." *Lines v. Larkins*, 208 F.3d 153, 160 (2000) (citing *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Regardless of whether the unexhausted procedurally defaulted issue may be considered, the district court "must decide the merits of the claims that are exhausted and not barred." *Toulson v. Beyer*, 987 F.2d 984, 987 (3d. Cir. 1993).

The issue that petitioner raised for the first time in his objections to the magistrate judge's report is procedurally defaulted in Pennsylvania's courts because it would be untimely. Pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment become final. . ." 42 Pa. Cons. Stat. Ann. §§9545(b)(1) (Purdon's 1998). A judgment becomes final "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." §9545(b)(3); *see Commonwealth v. Banks*, 726 A.2d 374, 375-76 (making clear after some confusion in the state caselaw that the one-year limitation applies to all PCRA petitioner including second petitions, regardless of when the first was filed and regardless of the capital nature of case); *see also Lines*, 208 F.3d at 164-65 (applying this one year limit to show that issue was procedurally defaulted at the state level to warrant analysis of the exhausted claims on their merits).

Petitioner McClure was convicted on June 9, 1998. On direct appeal, the trial court denied relief. Then, the Pennsylvania Superior Court affirmed the judgment on sentence, and the Pennsylvania Supreme Court denied allowance of appeal. Finally, the United States Supreme Court denied certiorari on June 12, 2000, signifying the finality of the judgment against petitioner for purposes of the PCRA. Accordingly, petitioner's one year opportunity for filing PCRA petitions expired on June 12, 2001.

Consequently, he is now procedurally barred from filing a petition under the PCRA asserting the issue he has just raised in his objections to the magistrate judge's report.[12] Moreover, petitioner has never alleged "cause and prejudice" or "miscarriage of justice"; therefore, this court may not consider his newly raised issue on its merits.

Conversely, the exhausted issues properly raised in the federal habeas petition must be addressed. As stated above, the magistrate judge conducted a thorough and compelling review of these issues. Therefore, I will adopt that report and deny the pending petition for writ of habeas corpus.

---

[12] There are three statutory exceptions to this one-year limitation, however none apply here. Untimeliness may be excused if a petitioner proves one of three enumerated reasons for his failure to raise this issue in a timely fashion. §9545(b)(1). Yet, petitioner cannot now argue that any of these apply to him because he adamantly asserts that he *did* raise this issue in a timely fashion throughout direct and collateral appeal; he argues that the courts have simply misunderstood his position. Obj. to Mag. Rep. at 2. As such, it would be wholly disingenuous to now assert that he *did not* bring it before, but he has a good reason for it. Therefore, this unexhausted issue is subject to procedural default.

IN THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE,	:	
Petitioner,	:	
	:	
v.	:	CIVIL ACTION
HARRY E. WILSON,	:	No. 02-1206
Superintendent, State	:	
Correctional Institution at	:	
Cresson, Cresson, PA, and	:	
THE DISTRICT	:	
ATTORNEY of the County	:	
of Carbon, and THE	:	
ATTORNEY GENERAL	:	
of Pennsylvania	:	
	:	
Respondents.	:	

ORDER

And now on this 4th day of February, 2003, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2254, is DENIED and DISMISSED.

4. As petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

/s/ William H. Yohn, Jr.

William H. Yohn, Jr., Judge

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing **Notice of Appeal** was served this 4 day of March, 2003, by United States Mail, first class mail delivery, postage pre-paid, to the following individuals:

Harry E. Wilson, Superintendent,
State Correctional Institution at Cresson, PA
P.O. Box A
Old Route 22
Cresson, PA 16699-0001

Mike Fisher, Attorney General
Office of Attorney General
c/o Francis R. Filipi,
Senior Deputy Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

United States District Judge
William H. Yohn, Jr.
14613 United States Courthouse
601 Market Street
Philadelphia, PA 19106

United States Magistrate Judge
Charles B. Smith
3006 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Gary F. Dobias, District Attorney
Carbon County Courthouse
P.O. Box 36
Jim Thorpe, PA 18229

/s/ James R. Hankle
James R. Hankle, Esquire

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Received April 1, 2003
U.S.C.A. 3rd Cir.

EDGAR D. McCLURE, CA NO. 03-1638

Appellant, E.D. Pa. Civ.

v. No. 02-1206

HARRY E. WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, PENNSYLVANIA, and THE DISTRICT ATTORNEY OF THE COUNTY OF CARBON, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellees.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

Applicant, Edgar D. McClure, by counsel, James R. Hankle, Esquire and the law firm of Sherrard, German & Kelly, P.C., timely files the instant Application for Certificate of Appealability from the February 4, 2003, Final Order by the Honorable William H. Yohn, Jr. of the United States District Court for the Eastern District of Pennsylvania denying Applicant's Habeas Corpus Petition. This Application sets forth a summary of the arguments which Applicant intends to present more fully upon the granting of the Certificate of Appealability.

SCOPE OF REVIEW

Title 28, Section 2254(d) United States Code governs the standard of review of the claims raised on appeal of the denial of Applicant's Habeas Corpus Petition. Pursuant to that section, the reviewing Court must first inquire whether the State Court decision was "contrary to" clearly established federal law and if it was not, the Court must evaluate whether

the State Court judgment rests upon an objectively unreasonable application of the facts adduced at trial and/or clearly establish Supreme Court jurisprudence. Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996). This Court will have plenary review of the Order of the District Court denying Applicant's Petition for Habeas Corpus. Cabrera v. Barbo, 175 F.3d 307, 312 (3d Cir. 1999); Zettlemoyer v. Fulcomer, 923 F.2d 284, 291 n.5 (3d Cir. 1991).

Applicant seeks to obtain from this Honorable Court a Certificate of Appealability certifying Applicant's right to appeal the District Court's denial of Applicant's Habeas Corpus Petition. A certificate of appealability may issue from a circuit or district judge if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

PROCEDURAL POSTURE

Applicant's Appeal of a denial of a Habeas Corpus Petition arises out of the conviction of Applicant in the Court of Common Pleas of Carbon County, Pennsylvania. Applicant was represented during his trial by attorneys Michael Garfield and Robert Yurchak. After a three hour jury trial on June 9, 1998, Applicant was found guilty of five counts of Rape, five counts of Statutory Rape, four counts of Involuntary Deviate Sexual Intercourse, nineteen counts of Indecent Assault, two counts of Corruptions of Minors, and two counts of Criminal Conspiracy.

Immediately following his conviction, Applicant retained new counsel and post verdict motions were filed raising, *inter alia*, Applicant's contention that he received ineffective assistance of counsel during his trial. Specifically, Applicant asserted that trial counsel's failure to put Applicant on the witness stand to testify in his own defense, a decision resulting from counsel's error of law, constituted ineffective assistance of counsel. The post verdict motions were ultimately denied by the trial court, and Applicant was sentenced to a prison term of nineteen to thirty-eight years. See Trial Court Opinion cited November 20, 1998, attached hereto as Exhibit A.

Applicant appealed the denial of the post trial motions to the Superior Court of Pennsylvania, again raising and briefing his assertions that he had received ineffective assistance of counsel during his trial. The Superior Court, declining directly to address the legal arguments raised by Applicant, adopted the trial court opinion in its entirety and affirmed on that basis. Applicant subsequently sought appellate review by the Supreme Court of Pennsylvania, again raising the issue of ineffective assistance of counsel, but that Court declined to hear Applicant's appeal. Applicant then filed a Writ of Certiorari to the United States Supreme Court but review was denied.

On January 30, 2001, Applicant reasserted his arguments before the Pennsylvania trial court under the Post Conviction Collateral Relief Act ("PCRA"). On February 27, 2001, the trial court summarily denied the PCRA Petition without a hearing. Upon appeal of that denial to the Superior Court of Pennsylvania, the Superior Court denied relief without granting any oral argument on the matter.

Having exhausted his avenues of direct appeal, Applicant, on March 8, 2002, timely filed his first and only Federal Habeas Corpus Petition in the United States District Court for the Eastern District of Pennsylvania. In his Petition, Applicant continued to assert his argument regarding ineffective assistance of counsel and further asserted that the multiple failures of the state appellate courts to consider the legal merits of his ineffective assistance of counsel argument constituted a violation of Applicant's Due Process.

On May 22, 2002, Magistrate Judge Charles B. Smith issued a Report and Recommendation denying Applicant relief without a hearing. The Report and Recommendation are attached hereto as Exhibit B. After consideration of Applicant's objections thereto, on February 4, 2003, the Honorable William J. Yohn, Jr. issued an Order approving and adopting the Magistrate's Report and Recommendation. A copy of Judge Yohn's Order is attached hereto as Exhibit C. Judge Yohn's Order further stated that no Certificate of Appealability would issue.

Applicant timely filed a Notice of Appeal from the Order of the District Court to the Court of Appeals for the Third Circuit.

FACTUAL SUMMARY

The charges upon which Applicant was prosecuted arose from allegations that Applicant had repeatedly sexually assaulted two minor children over the period of several years. The undisputed evidence at trial established that Applicant, who had no prior criminal record, had been a friend of the father of the victims and had visited the home of the victims several times during the period in question. The totality of the Commonwealth's case against Applicant consisted solely of the testimony of the two female victims. In defense, Applicant's trial counsel relied solely on the testimony of a handful of character witnesses who testified to Applicant's good reputation and chastity within the community. Counsel advised Applicant against taking the witness stand to rebut the testimony of the Commonwealth's witnesses or to provide any exculpatory testimony in his own defense.

At hearing on Applicant's post-trial motions, trial counsel admitted that they advised Applicant against testifying in his own defense at trial:

> Q. Now, during the time period that you represented Mr. McClure, did you ever suggest that Mr. McClure should not take the stand and testify on his own behalf?
>
> A. (Mr. Yurchak) I believe Mr. Garfield and I discussed that and that was our suggestion, yes.

(N.T. 10/19/98, p. 6). The relevant portions of the post-trial hearing transcript are attached hereto, collectively as Exhibit D.

Defense counsel attributed this decision to concern that if Applicant took the stand, he would be exposed to cross-examination or rebuttal evidence regarding an extra-marital consensual liaison in which he had engaged with the common law wife of the father of the two victims:

Q. Would putting Mr. McClure on the witness stand have opened him up to the statement that he made about Susan O'Neill?

A. (Mr.Yurchak) We felt it would.

(N.T. 10/19/98, p. 19).

* * *

Q. And with regard to Mrs. O'Neill, you felt that the fact that may come out would have been damaging to him, is that correct?

A. That is one of the factors we considered, yes.

(N.T. 10/19/98, p. 20).

ARGUMENT

If a Certificate of Appealability is granted by this Court, Applicant intends to assert two arguments in support of his appeal of the District Court's denial of his Habeas Corpus Petition. First, Applicant will establish that his trial counsel was unconstitutionally ineffective in failing, on the basis of a fundamental misunderstanding of applicable law, to put Applicant on the witness stand in order to testify in his own defense. Second, Applicant will contend that the multiple failures of the state courts to address the merits of his ineffective assistance claim constitutes a violation of Applicant's Due Process rights.

A. Trial Counsel's Failure to Advise Applicant to Testify in His Own Defense Constitutes Ineffective Assistance of Counsel

Defense counsel based its advice to Applicant not to testify at trial on a simple yet fundamental misunderstanding of law. Counsel erroneously believed that merely by testifying at trial, Applicant would be subject to cross-examination regarding his affair with the mother of the two victims. That mistake induced trial counsel to offer the only defense they believed remained: one based solely on the character of the Applicant and providing no opportunity for Applicant to testify in his defense. Contrary to counsel's belief, however, the Commonwealth would not have been

permitted to cross-examine Applicant as to the affair merely because he took the stand. The justification for resorting to the elicitation of character evidence in lieu of exculpatory testimony of Applicant was unfounded. The resultant failure to put Applicant, a man without any criminal record with which the Commonwealth could impeach, on the witness stand, constitutes ineffective assistance of counsel. For that reason, Applicant has been denied his constitutional right to effective assistance of counsel and a Certificate of Appealability should issue.

A discussion of the issue of ineffective assistance of counsel begins with the United States Supreme Court's holding in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Court explicitly held that a claim for ineffective assistance of counsel requires a defendant to establish that his lawyer's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant's case. Id. Generally, courts should employ a strong presumption of competence and use a deferential standard of review in recognition of the fact that often a counsel's decisions will be strategic in nature and should not be subject to the hindsight of a new standard. Kimmelman v. Morrison, 477 U.S. 365, 385-87 (1986).

Errors of law by counsel, however, cannot be protected against ineffective assistance of counsel claims merely by being masked as "strategy." Where the error by counsel is not tactical but rather is an unacceptable legal blunder, such as when the lawyer fails to do proper research and ends up misunderstanding the law, counsel's ineffectiveness is manifest. See e.g., Cave v. Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992) (the mere incantation of the word "strategy" does not insulate attorney behavior from review). Where an error of law results in a decision that the accused will not take the stand in his won defense, both federal and Pennsylvania state law recognize the inherent ineffectiveness of counsel. See id.; Commonwealth v. Neal, 618 A.2d 438 (Pa. Super 1992) (where Defendant had no criminal record that could be impeached, it is ineffective assistance of counsel not to advise

the defendant to take the stand); Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990); Commonwealth v. Breisch, 719 A.2d 352 (Pa. Super 1998) (where Defendant lacked a criminal record that could have been impeached, was also not advised of her constitutional right to testify, faced a situation at trial where the outcome turned on the credibility of the victim, had a defense based on character, and also did not defend herself by testifying); Commonwealth v. Mancini, 490 A.2d 1377, 1386 (Pa. Super 1985) (recognizing that defense counsel could be ineffective without full consultation even if defendant decided not to testify).

Trial counsel testified that they were concerned that a decision to put Applicant on the witness stand would subject him to cross-examination on the issue of Applicant's affair with the mother of the victims. Analysis of the relevant law, however, indicates that counsel's decision was misplaced. Counsel's advice to Applicant, tainted by that mistake of law, nevertheless dissuaded Applicant from exercising his constitutional right to testify in his defense and constitutes ineffective assistance of counsel.

The Pennsylvania Rules of Evidence, in conjunction with 42 Pa.C.S.A. §5918 (1982), governed the admissibility of evidence regarding Applicant's extra-marital liaison. Where, as here, the crimes at issue do not concern the character of the accused, the Commonwealth is precluded from introducing any evidence as to the character of the accused unless it seeks to rebut character evidence introduced by the accused. See Pennsylvania Rule of Evidence 404; 42 Pa.C.S.A. §5918. In the event the accused "opens the door" to the Commonwealth's introduction of such evidence, the Commonwealth is permitted to introduce evidence of specific acts of the accused. See Pennsylvania Rule of Evidence 404(a)(1); 42 Pa.C.S.A. §5918. Thus, in a case such as Applicant's, the Commonwealth is precluded from introducing evidence pertaining to the accused's character if the accused does not first introduce evidence of his character.

Rules of Evidence 608 and 609 also relate to the issue of character. Those Rules concern the use of evidence of a

witness's reputation or character (Rule 608), including specific acts, or prior convictions (Rule 609), to impeach a witness. Importantly, those rules relate solely to evidence impacting a witness's truthfulness and veracity. Accordingly, they would not apply to evidence relating to an extra-marital liaison of the accused.

Trial counsel's expressed concern that Applicant would be subject to cross-examination regarding the alleged liaison was unfounded. The Pennsylvania Rules of Evidence and 42 Pa.C.S.A. §5918 make clear that the Commonwealth would not have been able to cross examine Applicant, or introduce its own evidence as to that liaison, merely because Applicant took the witness stand.

In addressing what they perceived to be the essence of Applicant's ineffective assistance claims, the United States Magistrate observed that while the Commonwealth is generally prohibited from introducing evidence of the accused's specific acts, such cross examination and rebuttal evidence is permitted once the accused puts forth evidence of his own good character. Report and Recommendation, at p.12. This analysis, however, ignores that Applicant's trial counsel employed a character-based defense because they believed that to put Applicant on the stand would expose him to questioning regarding the liaison.

In fact, Applicant's character became an issue at trial only after his counsel had mistakenly concluded that allowing Applicant to testify and to rebut the allegations made against him by the two victims would open the door to the issue of the extra-marital liaison. Counsel chose not to put the Applicant on the stand, and instead to put forth a character defense, because of what it perceived as the tactical disadvantages of exposing Applicant to cross-examination regarding the liaison. Those perceived disadvantages, however, were illusory. No evidence regarding the liaison would have been admissible had counsel not raised the issue of character at trial. Counsel advised Applicant not to take the stand based on the ill-informed misperception that Applicant would be exposed to cross-examination or rebuttal evidence regarding

the liaison. As Applicant intends to argue more fully if this Application is granted, this error of law represents more than bad strategy; it constitutes counsel falling well below the objective standard set forth in Strickland and constitutes a deprivation of Applicant's right to effective assistance of counsel.

That the advice to Applicant not to testify in his own defense prejudiced Applicant's case is equally manifest. It is well settled that a defendant in a criminal case has a constitutionally-based right to take the witness stand and to testify in his or her own defense. See Neal, 618 A.2d at 441, citing Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704 (1987). Indeed, "the most important witness for the defense in many criminal cases is the defendant himself." Rock, at 52, 107 S.Ct. At 2709. "Even more fundamental to a personal defense than the right of self representation ... is an accused's right to present his own version of events in his own words." Id. The decision to testify on one's own behalf is ultimately to be made by the defendant after full consultation with counsel. Commonwealth v. Breisch, 719 A.2d 352 (Pa.Super. 1998) (additional citations omitted). Any waiver of that constitutional right must be knowing and intelligent. Id.

It is widely accepted that where counsel gives advice so specific advice so unreasonable as to vitiate a knowing and intelligent decision, an ineffective assistance claim may be stated. See e.g., Breisch, 719 A.2d 352 (counsel's advice regarding the defendant's right to testify held insufficient); United States v. Wiener, 127 F.Supp.2d 645 (E.D.Pa. 2001) citing United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) (holding that a defendant who alleges that he received advice from his counsel that was so incorrect and insufficient that it undermined his ability to make an intelligent decision about whether to accept a plea offer states a Sixth Amendment Claim); Neal, 618 A.2d 438 (where Defendant had no criminal record that could be impeached, it is ineffective assistance of counsel not to advise the defendant to take the stand). Accordingly, notwithstanding that both the trial court and the District Court insist that Applicant, and not his

counsel, decided against Applicant taking the stand, that decision was not valid if it was based on unsound advice from counsel.

In this case, defense counsel advised Applicant against testifying not because of case strategy but because of a fundamental and unreasonable misunderstanding of the rules governing the admission by the Commonwealth of specific acts of the accused. Counsel's specific advice, premised on an incorrect perception of applicable law, impaired Applicant's ability to knowingly and intelligently waive his right to testify in his defense.

The nature of the prosecution makes even more evident the prejudice Applicant has suffered. Where, as here, the outcome of the case turns on the credibility of the victim, the defendant's right to testify is of the utmost importance. See Neal, 618 A.2d 438 (holding that where the defendant's testimony would have rebutted the victim's incriminating testimony, the defendant's testimony was considered essential defense testimony); Breisch, 719 A.2d 352. As in Neal, the sole evidence put forth by the Commonwealth consisted solely of the testimony of the two victims and Applicant's testimony was essential to defense against those charges. That Applicant was advised not to offer such testimony because his lawyers misunderstood Applicant's exposure to cross-examination constitutes ineffective assistance of counsel.

B. The Multiple Failures of the State Appellate Courts To Consider the Merits of Applicant's Ineffective Assistance of Counsel Argument

In its opinion following post trial motions, the trial court found that Applicant's counsel had been effective by not calling Applicant to the stand based on (1) Applicant's preexisting relationship with the victims' family; (2) Applicant's liaison with the victims' mother; and (3) the conclusion that the decision was left to Applicant's discretion after full discussion with his trial attorneys. In so holding, the trial court illustrated that it failed to understand that Applicant contended that the decision not to take the stand, and instead to assert a character defense, was based on specific and

erroneous legal advice Applicant received from counsel. While the trial court embarked on a cogent discussion of the circumstances under which the Commonwealth may cross-examine an accused regarding specific acts, it did not address that Applicant's character would not have been injected into the trial had counsel not advised Applicant against taking the stand in his own defense on the basis of a misunderstanding of law. That failure, and the appellate courts' failure to address the merits of applicant's arguments, or to offer any opinion as to those arguments, violated Applicant's Due Process rights.

Where a state acts in the appellate process, it must do so within the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 404 (1985) (reversing the long-held view that the Federal Constitution has no concern for a state's appellate process or rights). As stated in Strickland, "[t]he Constitution guarantees a fair trial largely though the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment..." Strickland, 466 U.S. at 684-685. It naturally follows that the convergence in Strickland of principles of Due Process and Effective Assistance of Counsel, to ensure a fair trial, extends to appellate procedures as well.

Federal courts have no supervisory power over state trial courts. In Harris v. Rivera, however, the United States Supreme Court explained that

> the work of appellate judges is facilitated when trial judges make findings of fact that explain the basis for controversial rulings . . . [but] there are occasions when an explanation for a decision may be required by the demands of due process.

Harris, 454 U.S. at 344 (emphasis added). Though the Supreme Court noted in Harris that the occasion for such explanations are "the exception rather than the rule," the possibility that such exceptions exist cannot be denied. Indeed, where appellate counsel makes a valid, record-based argument that an error of law by trial resulted in ineffective assistance of counsel that manifestly prejudiced the accused's

defense, it is difficult to conceive of a more appropriate occasion to infer the necessity of such an explanation.

Here, due to the failure of the state courts to consider or address the specific arguments raised by Applicant, Applicant has been forced to appeal the lower courts' adverse rulings without actually understanding the legal bases for those holdings. The summary disposition of each of Applicant's appeals, absent any evidence of any undertaking to address the legal claims raised therein, violates the essential notions of Due Process and the Applicant's right to a fair trial. Accordingly, if this Court grants Applicant a Certificate of Appealability, Applicant believes he will establish that the multiple failures of the Pennsylvania appellate courts to address the arguments Applicant has raised, arguments which have not yet been properly addressed by any court, violated Applicant's right to Due Process.

CONCLUSION

Applicant submits that he has substantially demonstrated the deprivation of two constitutional rights: the right to effective assistance of counsel and the right to due process. On appeal, Applicant will establish that his trial counsel's performance dropped below the objective standard contemplated by the Court in Strickland. Specifically, Applicant's counsel, operating under a fundamental mistake of law, advised Applicant not to take the witness stand in his own defense and the consequent decision not to take the stand prejudiced Applicant's defense. Also on appeal, Applicant will establish that the multiple failures of the state courts to consider and address in written opinions the legal arguments put forth by Applicant so violated common notions of fair play as to constitute a violation of his right to Due Process and a fair trial.

Accordingly, Applicant respectfully requests that this Honorable Court issue a Certificate of Appealability and set a briefing schedule for Applicant's appeal of the District Court's denial of Applicant's Habeas Corpus Petition.

Respectfully submitted,
SHERRARD, GERMAN
& KELLY, P.C.

/s/ James R. Hankle
James R. Hankle, Esquire
Attorney for Plaintiff
PA I.D. No. 36019
35th Floor, FreeMarkets Center
Pittsburgh, PA 15222-2602
(412) 355-0200

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF :
PENNSYLVANIA :
VS. : No. 260 CR 96
EDGAR D. McCLURE :
Defendant :

David W. Addy, Esquire
Counsel for Assistant District
Attorney Commonwealth
James R. Hankle, Esquire
Counsel for Defendant

OPINION AND ORDER

Webb, J. – November 20, 1998

Edgar D. McClure has filed Post-Sentence Motions to the judgments of sentence imposed for various sexual offenses committed against two minor girls.

FACTS

The facts, when viewed most favorably to the Commonwealth as verdict winner, begin with the dysfunction of the family of the victims, Melissa and Jennifer, born on November 28, 1979 and October 28, 1985, respectively. The girls have never been married, and are two of twelve children born to parents Brian and Susan O'Neill. N.T. 6/9/98 at 17-18, 31, 47 & 55. The dysfunction began with Brian subjecting Susan and the children to physical abuse, id. at 19-21 & 48-49, and escalated to his use of threats and beatings to force Melissa and Jennifer to engage in sexual acts with him and other men. Id. at 19-30 & 49-55. Neither girl understood the nature or wrongfulness of the sexual behavior, but submitted because they feared their father. Id. at 26-30 & 54-55.

This pattern of abuse continued after the family moved to Carbon County in 1987, id. at 18, where the father allowed McClure to sexually molest Melissa approximately once every month or every other month during 1990 through 1992. The father would send Melissa to his bedroom with McClure to "play house," his euphemism for sex, and peek through or listen at the door, while McClure engaged in vaginal and oral sex with Melissa. Id. at 24-33. During this time period, McClure was in his fifties, id. at 62, while Melissa was only 10 to 12 years old.

Eventually, the sexual molestation extended to Jennifer, who was subjected to vaginal intercourse with McClure approximately once or twice a month during 1991 through 1992. Id. at 50-55. When Jennifer was only 5 and 6 years old, the father would take her to his bedroom with McClure, order her to undress, and watch as McClure engaged in vaginal intercourse.

Despite the multiple occurrences in each year, McClure was charged with only one count of the various crimes per year in regard to each girl. The jury found the Defendant guilty of all charges submitted to it. Specifically, for the sexual abuse of Jennifer, McClure was convicted of rape[13], statutory rape[14], indecent assault[15], corruption of

---

[13] The amended 1984 rape statute was in effect during the incidents in question provided, inter alia, that a person commits rape when he engages in sexual intercourse with another person not his spouse, who is so mentally deficient that such person is incapable of consent. 18 Pa.C.S.A. §3101 & §3121(4).

[14] A person who is 18 years of age or older commits statutory rape, a felony of the second degree, when he engages in sexual intercourse with another person not his spouse who is less than 14 years of age. 18 Pa.C.S.A. §3101 & §3122 (1976).

[15] A person who has indecent contact with another not his spouse, or causes the complainant to have indecent contact with him, is guilty of indecent assault, ...if (1) he does so without the consent of the other person; (2) he knows that the other person suffers from a mental defect which renders her incapable of appraising the nature of her conduct; (3) he knows that the other person is unaware that a (sic) indecent contact is being committed; or (6) he is over 18 years of age and the other person is

minors[16], and conspiracy. As to Melissa, the convictions included these crimes as well as involuntary deviate sexual intercourse (IDSI)[17]. Timely Post-Sentence Motions were then filed.

DISCUSSION

Defendant raises the issues of the sufficiency of the evidence, the weight of the evidence, prosecutorial misconduct and the ineffectiveness of his trial attorneys.

SUFFICIENCY OF EVIDENCE

Defendant challenges the sufficiency of the evidence to support his convictions for conspiracy and all of the sex offenses. The standard for reviewing the sufficiency of the evidence is whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the Commonwealth as verdict winner, is sufficient to support all elements of the offenses beyond a reasonable doubt. Commonwealth v. Miller, 664 A.2d 1310, 1314 (Pa. 1995), cert. denied, _____ U.S. _____, 116 S.Ct. 932, 133 L.E.2d 859. In sex offense prosecutions, the testimony of the victim, standing alone, is sufficient to convict. Commonwealth v. Kunkle, 623 A.2d 336 (Pa.Super. 1993), alloc. denied, 637 A.2d 281 (Pa. 1993).

Here, the testimony of both victims amply supported Defendant's convictions. Melissa attested to vaginal and oral intercourse during 1990 through 1992, supporting the convictions for rape and IDSI, respectively. For Jennifer, her testimony of vaginal intercourse supported the rape convictions for the years 1991 and 1992. The indecent

---

under 14 years of age. 18 Pa.C.S.A. §3126(1) (2) & (3) (1976); 18 Pa.C.S.A. §3126(6) (effective 4/3/90).

[16] Whoever, being of the age of 18 years and upwards, by any act corrupts or tends to corrupt the morals of any minor less than 18 years of age, ... is guilty of a misdemeanor of the first degree. 18 Pa.C.S.A. §6301 (1978).

[17] A person commits a felony of the first degree when he engages in deviate sexual intercourse with another person: (4) who is so mentally...deficient that such person is incapable of consent; or (5) who is less than 16 years of age. 18 Pa.C.S.A. §3101 & 3123(4) & (5) (1973).

assaults and corruption of minors are sustained by any of the sexual contacts.

LACK OF SPECIFIC DATES

Nonetheless, Defendant argues that the Commonwealth did not establish with any degree of specificity particular dates on which the sexual acts occurred. While the Commonwealth must establish to a reasonable degree of certainty the approximate date of the offense charged, it need not always prove a single specific date of the crime. Commonwealth v. Robinson, 462 A.2d 840, 842 (Pa.Super. 1983), quoting, Commonwealth v. Devlin, 333 A.2d 888, 899 (Pa. 1975). Accord: Commonwealth v. Niemetz, 422 A.2d 1369 (Pa.Super. 1980).

> [T]he rule has been somewhat relaxed when the victim is a child...When a young child is a victim of a crime, it is often impossible to ascertain the exact date when the crime occurred. He or she may have a vague sense of the days of the week, the months of the year, and the year itself. If such children are to be protected, imprecision concerning times and dates must be tolerated.

Commonwealth v. Luktisch, 680 A.2d 877, 880 (Pa.Super. 1996) (citations omitted). Any leeway permissible would vary with the nature of the crime and the age and condition of the victim, balanced against the rights of the accused. Niemetz, 333 A.2d at 892 (footnote and citations omitted).

Here, the facts are analogous to Niemetz and its progeny. The crimes occurred repeatedly against very young girls over a two or three year period, as opposed to an isolated incident. Thus, they were not susceptible to being dated with a reasonable degree of certainty. Commonwealth v. McClucas, 516 A.2d 68 (Pa.Super. 1986).

Despite minor inconsistencies in their recollection, the girls recounted graphic details of the abuse. The jury heard and observed the girls as they testified, and the credibility of the witnesses and the weight to be accorded the evidence produced are matters within their province. Commonwealth

v. Perez, 698 A.2d 640, 645 (Pa.Super. 1997) (citations omitted). Based on their testimony, the jury could reasonably believe that the girls were subjected to repeated sexual abuse and find at least one occurrence during each of the relevant years.

CONSPIRACY

In regard to conspiracy, McClure argues there was insufficient evidence to prove an agreement between himself and the father to commit the sex crimes. In order to convict a defendant of a conspiracy, a fact finder must conclude that he reached an agreement with his co-conspirator to commit the crime. 18 Pa.C.S.A. 903(a)(1); Commonwealth v. Anderson, 552 A.2d 1064, 171 (Pa.Super. 1988), alloc. denied, 571 A.2d 379 (Pa. 1989) (citations omitted). The existence of a common agreement between co-conspirators, may be inferred from circumstantial evidence surrounding the allegedly conspiratorial activities, and from the relationship between and the conduct of the parties. Id.

In the instant case, an agreement can be inferred from the manner in which the crimes occurred. The father sent McClure upstairs to his bedroom with one girl at a time. The girl was then instructed to undress and "play house," which she understood to mean submitting to the various sexual acts. The father would remain in the room, or peek through or listen at the door, while McClure actually completed the sexual crimes underlying the conspiracy. Based on this coordinated conduct, the friendship of the co-conspirators, and the duration of the abuse, the jury could infer the requisite agreement for conspiracy.

WEIGHT OF THE EVIDENCE

The Superior Court has explained the proper standard of review applicable to a challenge to the weight of evidence:

> A true "weight of the evidence" claim contends the verdict is a product of speculation or conjecture. Such a claim requires a new trial only when the verdict is so contrary to the evidence as to shock one's sense of justice. A decision regarding the weight of the evidence is within the sound discretion of the trial

judge whose decision will not be reversed on appeal absent an abuse of that discretion.

Commonwealth v. Dougherty, 679 A.2d 779, 785 (Pa.Super. 1996). A review of the record in this case reveals that the verdict was not against the weight of the evidence.

PROSECUTORIAL MISCONDUCT

Defendant next accuses the prosecution of misconduct arising from several statements made at trial. Generally, comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Commonwealth v. Morales, 701 A.2d 516, 527-528 (Pa. 1997). Prosecutorial misconduct will not be found where comments were based on the evidence or proper inferences therefrom or were only oratorical flair. Id. at 528. Moreover, in order to evaluate whether the comments were improper, the court must look at the context in which they were made. Id.

In opening argument, McClure contends the Commonwealth impermissibly expressed an opinion of his guilt by stating: "My words can't do what they endured justice." N.T. 6/9/98 at 9. This portion of opening argument shows the prosecution was merely introducing the victims and preparing the jury for the graphic nature of the testimony they were about to hear. To cast this statement as other than oratorical flair is to contort its context and substance.

In regard to closing argument, Defendant highlights four instances of alleged prosecutorial misconduct. In the first one, Defendant claims the jury was misled about a police report. However, the prosecutor never mentioned a police report when closing. The statement cited by Defendant is, instead, from the defense's closing argument. N.T. 6/9/98 at 95-96.

Secondly, Defendant claims the prosecutor misstated the law of conspiracy:

> First, criminal conspiracy; acting in accordance with another – specifically Brian James O'Neill, the father – with the intent to achieve a criminal result. Conspirators don't have to have a written contract. They just have to act together to form a result.

N.T. 6/9/98 at 102. Read as a whole, the Court can see no error in this statement. A conspiracy can be inferred from the acts of the conspirators done in furtherance of the criminal aim. See discussion supra. Moreover, the Court provided a full and proper charge on the elements of conspiracy. N.T. 6/9/98 at 135-139. Therefore, no prejudice inured to Defendant.

The third statement from closing argument arises from the prosecutor calling Defendant's co-conspirator "dirt":

> Ladies and gentleman, I also don't want you to be put off by the number of witnesses. Although there are no corroborating witnesses, ladies and gentleman, the testimony is very clear that Mr. McClure came to Palmerton. The testimony is equally clear that he went up to Dad's bedroom and had his way from each one of them. Who else in that bedroom would I submit to you? *Who would I have to give you in that bedroom? Mr. McClure, who, as Mr. Garfield has pointed out, has chosen not to testify and stand on that? Brian O'Neill? I wouldn't put that dirt on the stand in front of you.*

N.T. 6/9/98 at 112 (emphasis added). A review of the transcript reveals the prosecutor merely mirrored the exact language used by the defense in its closing argument. Id. at 92. The prosecutor is entitled to fairly respond to closing remarks made by defense counsel. Commonwealth v. Hawkins, 701 A.2d 492 (Pa. 1997), cert. denied, _____ U.S. _____, 118 S.Ct. 1535, 140 L.E.2d 685. Where both sides used the same oratorical flair, the Court cannot fathom how this amounts to prosecutorial misconduct.

Defendant's final challenge is also derived from the above text and focuses on the reference to Defendant's choice

not to testify. This passing statement did not imply Defendant was guilty based on his unwillingness to testify, and thus, did not violate his constitutional right against self-incrimination. Commonwealth v. Kelly, 528 A.2d 1346 (Pa.Super. 1987), alloc. denied, 535 A.2d 1057 (Pa. 1987).

Rather, the remarks were proper rebuttal to the arguments of defense counsel. During closing argument, the defense focussed on Defendant's decision to not testify, the victim's lack of credibility and the limited amount of testimony presented by the prosecution. The prosecuting attorney properly responded by referring to the fact that the dirth of eyewitnesses in the bedroom was due to the hidden nature of sexual abuse.

Additionally, this Court properly instructed the jury on Defendant's absolute right to not take the stand, from which the jury could draw no inference of guilt. N.T. 6/9/98 at 133. The Court further advised them that Defendant is presumed innocent and need not present any evidence, because the burden of proof is on the prosecution to prove each and every element of the offenses. Id. at 118-119 and 133. Therefore, any prejudice to Defendant was mitigated by these instructions.

INEFFECTIVENESS OF TRIAL COUNSEL

The standard of review when evaluating a claim of ineffectiveness of counsel is well settled. It is presumed that trial counsel is effective and defendant has the burden of proving otherwise. Commonwealth v. Lewis, 708 A.2d 497 (Pa.Super. 1998), alloc. denied, _____ A.2d _____ (Pa. 1998) (citations omitted). The first determination is whether the issue underlying the claim is of arguable merit. Id. If the claim is without merit, then the inquiry ends because counsel will not be deemed ineffective for failing to pursue an issue without basis. Id. Even if the underlying claim has merit, the defendant must establish that the course of action chosen by counsel had no reasonable basis designed to effectuate the client's interests and, finally, that the ineffectiveness prejudiced his right to a fair trial. Id.

On October 19, 1998, a hearing was held on the issue of the trial attorney's effectiveness. Although the Court has not set forth separate findings of fact and conclusions of law, we believe that this portion of the discussion clearly enunciates the facts adduced from the hearing and the legal conclusions derived therefrom.

Defendant first claims the defense team was ineffective by pursuing a character defense, instead of an alibi. At the hearing, the trial attorneys, Michael Garfield and Robert Yurchak, testified credibly to discussing the possible defenses with McClure. Ultimately, a character defense was chosen, which would present McClure as an honest family man based on his lack of a criminal record, his good reputation in the community and his consistent denial of the charges.

In addition, the defense attorneys had rejected an alibi defense, because McClure admitted to being present in the victims' home during the years in question, although he denied committing the crimes. Therefore, the real issue was not whether Defendant was somewhere else when the crimes occurred, see Commonwealth v. Kolenda, 676 A.2d 1187 (Pa. 1996), but whether the jury would believe the victim's version of events. The defense strategy of emphasizing Defendant's good character, inferring it was unlikely that he committed any of the offenses, was thus a reasonable one.

When presenting this defense at trial, Defendant asserts that more than four character witnesses have been called to testify. The defense informed the Court and the jury that there were many character witnesses in the courtroom willing to testify. However, the Court limited the presentation, because it would be cumulative. N.T. 6/9/98 at 81. These four character witnesses lived near McClure, and included an ex-police officer/ex-Marine and three co-workers from the company where Defendant had worked for many years. The Court properly instructed the jury that the testimony of the character witnesses alone could raise a reasonable doubt and justify a verdict of not guilty. N.T. 6/9/98 at 133-134. Therefore, the presentation of the

character defense was more than adequate and did not constitute ineffectiveness of counsel.

McClure next states that his work schedule should have been offered into evidence to disprove the alleged frequency of the crimes. However, his attorneys found many time gaps in it, including weekends and vacations, which were consistent with the girls' account. Thus, the work schedule was of limited evidentiary value, if not harmful to the defense.

Related to this issue is trial counsel's alleged ineffectiveness for failing to call certain witnesses. In order to establish that trial counsel was ineffective for failing to call witnesses, a petitioner must:

> (1) identify the witness or witnesses;
>
> (2) demonstrate that counsel actually knew, or had a duty to know, the identity of the witness or witnesses prior to trial;
>
> (3) demonstrate that the witness or witnesses were ready, willing and able to testify for the defense at trial; and
>
> (4) demonstrate that the proposed testimony would have been helpful to the defense asserted at trial.

Commonwealth v. Schultz, 707 A.2d, 513, 5199 (Pa.Super. 1997).

First, McClure claims his wife should have been called to fill in the gaps in his work schedule. However, the wife could not account for much of the time, because her husband often spent weekends alone in Easton, Pennsylvania, approximately an hour from the scene of the crime.

In addition, Defendant asserts his wife should have been called as a character witness and to recount that no abuse occurred when they twice visited the victims' home together. Defendant's exercise of self-control in his wife's presence was of limited value in showing no abuse during the visits when she was not there. Her worth as a character witness was also compromised by her natural bias as Defendant's spouse.

Thus, the relevance and helpfulness of the wife's testimony is questionable, and no ineffectiveness can attach in not calling her.

Defendant next argues his trial attorneys were ineffective in failing to call him to testify at trial. The decision whether to testify is ultimately to be made by the accused after consultation with counsel. Commonwealth v. Whitney, 708 A.2d 471 (Pa. 1998). Trial counsel is not ineffective where the decision to not call defendant was reasonable. Id.

At the hearing on the Post-Sentence Motion, McClure admitted to discussing the pros and cons of testifying at trial with his attorneys. Although testifying would have allowed him to deny the accusations directly to the jury, it would have opened the chosen defense to attack. Specifically, McClure could have been cross-examined about his admissions to the police of a sexual relationship with the victims' mother, who was also the purported common law wife of his friend and co-conspirator. This evidence would have contradicted McClure's claim of good character for chastity and respect for family values.

In addition, testifying could have drawn attention to McClure's repeated visits to the victims' home. This would have given rise to contemplation as to why he continued a relationship with the father, even visiting him in prison while standing accused in the present case. Therefore, it was reasonable to not call McClure to the stand based on his relationship with the victims' family, the character defense, and the decision being left to McClure after full discussion with his trial attorneys. Further, as discussed supra, the Court advised the jury that no inference of guilt could be drawn from Defendant's decision to not testify. N.T. 6/9/98 at 133.

McClure also asserts the defense should have called Pat Lennox, Crystal Merwin and his step-daughter to testify at trial. Not only did Defendant fail to demonstrate their willingness and availability to testify, he merely posits questions or theorizes about what they might have stated.

Without knowing the content of their proposed testimony, this Court cannot determine its relevance and value to the case.

Similar to this claim, Defendant argues that the defense should have investigated his case more thoroughly, but points to no evidence of an exculpatory or helpful nature, which would have been found. Accordingly, since both claims are based on pure conjecture, the Court can find no merit in them.

In his next allegation of ineffectiveness, McClure states the defense's closing argument failed to properly survey or attack the evidence. In closing argument, Attorney Garfield argued against the credibility of the victims. He also highlighted the role of Defendant's good character and the Commonwealth's burden of proving the charges beyond a reasonable doubt. N.T. 6/9/98 at 88-101. Since these were the key issues, the content of closing argument was reasonable, even if brief.

The final issue is the allegation of counsels' ineffectiveness in failing to properly respond to adverse pretrial publicity. Specifically, McClure asserts the defense should have: 1) questioned the potential jurors about the adverse impact of any pretrial publicity; and 2) filed a motion to change venue and venire.

First, McClure's attorneys did, in fact, ask the jury pool whether they had heard or read about the case in the newspaper, radio or television. N.T. 6/8/98 at 20. Only one juror responded affirmatively and he, ultimately, was not selected for the jury. Id. at 20-21 & 31-32. The Court further advised the selected jurors to avoid learning of the case from the media, since they must decide the case solely on the evidence presented in Court. N.T. 6/8/98 at 32.

Secondly, there was no actual prejudice preventing the impaneling of an impartial jury, because only one potential juror had even heard of the case, and he was not chosen. Commonwealth v. Rucci, 670 A.2d 1129, 1140 (Pa. 1996); cert. denied, _____ U.S. _____, 117 S.Ct. 1257, 137 L.E.2d 337. Also, McClure failed to present any evidence of pretrial

publicity, let alone sensational, inflammatory, or slanted coverage. Thus, this issue also lacks arguable merit.

Accordingly, we enter the following:

ORDER OF COURT

AND NOW, this 20th day of November, 1998, upon consideration of Defendant's Original and Supplemental Post-Sentence Motions, the submissions of the parties, and after argument held, it is hereby

ORDERED and DECREED that the Motions are **DENIED**.

BY THE COURT:

/s/ R. Webb

J.

NOTICE OF RIGHTS

The following notice is provided to advise the Defendant:

1. Of the right to appeal to the Pennsylvania Superior Court from the judgment of sentence and such appeal must be filed within 30 days from the entry of this order disposing of Defendant's Post-Sentence Motions, Pa.R.A.P. Rules 108 & 903;
2. Of the right to raise any issue properly preserved in the record below, whether or not included in the Post-Sentence Motions unless otherwise provided by law;
3. Of the right to assistance of legal counsel in the preparation of the appeal;
4. Of the rights to proceed informa pauperis and to have an attorney appointed to assist in preparation of the appeal, if the Defendant is indigent; and
5. That the right to bail after sentencing, when the sentence imposed includes imprisonment of 2 years or more, is within the discretion of the judge. Pa.R.C.P. Rule 4009(B)(1).

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

May 22, 2002

RE: MCCLURE V. WILSON, ET AL

CA No. 02-1206

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Smith, on this date in the above captioned matter. You are hereby notified that within ten (10) days of the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV(b)).

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P. 53, the procedure under that rule shall be followed.

MICHAEL E. KUNZ

Clerk of Court

By/s/ Linda V. Jerry

LINDA V. JERRY, Deputy Clerk

cc: Hankle

Addy

Courtroom Deputy to Judge Yohn

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. MCCLURE,	: CIVIL DIVISION
Petitioner	:
VS.	:
HARRY E. WILSON,	:
SUPERINTENDENT, STATE	:
CORRECTIONAL INSTITUTION	:
AT CRESSON, CRESSON, PA, AND	:
THE DISTRICT ATTORNEY OF	:
THE COUNTY OF CARBON, AND	:
THE ATTORNEY GENERAL OF	:
THE STATE OF PENNSYLVANIA,	:
Respondents	:

NO. 02-1206

ORDER

AND NOW, to wit, this day of , 2002, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

4. The Report and Recommendation is APPROVED and ADOPTED.

5. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is DENIED and DISMISSED in its entirety.

6. There is no probable cause to issue a certificate of appealability.

It is so ORDERED.

BY THE COURT:

_____

WILLIAM H. YOHN, JR. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. MCCLURE,	: CIVIL DIVISION
Petitioner	:
VS.	:
HARRY E. WILSON,	:
SUPERINTENDENT, STATE	:
CORRECTIONAL INSTITUTION	:
AT CRESSON, CRESSON, PA, AND	:
THE DISTRICT ATTORNEY OF	:
THE COUNTY OF CARBON, AND	:
THE ATTORNEY GENERAL OF	:
THE STATE OF PENNSYLVANIA,	:
Respondents	:
NO. 02-1206	

REPORT AND RECOMMENDATION

CHARLES B. SMITH

UNITED STATES MAGISTRATE JUDGE

Currently pending before the Court is a counseled Petition for Writ of Habeas Corpus filed, pursuant to 28 U.S.C. §2254, by a petitioner incarcerated in the State Correctional Institution at Cresson, Pennsylvania. For the reasons which follow, the Court recommends that the Petition be denied and dismissed.

IV. PROCEDURAL HISTORY

Following a jury trial in the Carbon County Court of Common Pleas, presided over by the Honorable Richard W. Webb, petitioner was convicted, on June 9, 1998, of five counts of rape, five counts of statutory rape, four counts of involuntary deviate sexual intercourse, nineteen counts of indecent assault, two counts of corruption of minors and two

counts of criminal conspiracy. The charges arose from petitioner's repeated sexual assault of two minor children over the period of several years. According to the evidence presented at trial, petitioner was a friend of the father of the two children and was invited over for purposes of molesting the children, often while the father watched.

Judge Webb sentenced petitioner to an aggregate term of nineteen to thirty years imprisonment. Thereafter, petitioner filed post-sentence motions, as well as supplemental post-sentence motions. The trial court conducted a hearing on the issue of ineffective assistance of trial counsel and, subsequently, by way of Opinion and Order dated November 20, 1998, denied relief. On appeal, the Pennsylvania Superior Court affirmed the judgment of sentence. Commonwealth v. McClure, 745 A.2d 42 (Pa. Super. Ct. 1999). The Pennsylvania Supreme Court thereafter denied allowance of appeal, Commonwealth v. McClure, 749 A.2d 468 (Pa. 2000), and, on June 12, 2000, the United States Supreme Court denied certiorari. McClure v. Pennsylvania, 530 U.S. 1230, 120 S. Ct. 2660 (2000).

Having received no relief on direct appeal, petitioner filed a petition, on January 30, 2001, pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S. § 9541, et seq. Upon the trial court denial of relief, petitioner appealed to the Pennsylvania Superior Court. On September 27, 2001, the Superior Court affirmed the lower court ruling. Petitioner did not seek allocatur from the Pennsylvania Supreme Court.

Petitioner, represented by counsel, filed the instant Petition for Writ of Habeas Corpus, on March 8, 2002, alleging the following grounds for relief:

3. Ineffective assistance of counsel for failing to put petitioner on the stand to testify in his own defense; and

4. Denial of Due Process under the Fourteenth Amendment because the state appellate process failed to provide adequate and specific reasons

for their rulings in response to a specific allegation of error by the trial counsel.

Considering these claims under the applicable standard of review, we find no basis for granting the writ.

V. STANDARD OF REVIEW

Under the current version of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), an application for writ of habeas corpus from a state court judgment bears a significant burden. Section 104 of the AEDPA imparts a presumption of correctness to the state court's determination of factual issues – a presumption that petitioner can only rebut by clear and convincing evidence. 28 U.S.C. § 2254(e) (Supp. 2000). The statute also grants significant deference to legal conclusions announced by the state court, as follows:

> An application for a writ of habeas corpus on behalf of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless that adjudication of the claim –
>
> (3) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (4) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1994).

The United States Supreme Court, in the decision of Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), interpreted the standards established by the AEDPA regarding the deference to be accorded to state court legal decisions and more clearly defined the two-part analysis set forth in the statute. Williams, 529 U.S. at 404-405. Under the first party of the review, the federal habeas court must determine whether the state court decision was "contrary to" the "clearly

established federal law, as determined by the Supreme Court of the United States." As defined by Justice O'Connor, writing for the majority of the Court on this issue, a state court decision can be contrary to Supreme Court precedent in two ways: 1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," or 2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that reached by [the Supreme Court]." Id. She explained, however, that this "contrary to" clause does not encompass the "run-of-the mill state-court decisions" applying the correct legal rule from Supreme Court cases to the facts of the prisoner's case." Id. At 406.

To reach such "run-of-the-mill" cases, Justice O'Connor turned to an interpretation of the "unreasonable application" clause of § 2254(d)(1), and found that a state court decision can involve an unreasonable application of Supreme Court precedent: 1) "if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the particular state prisoner's case," or 2) "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context should apply." Williams, 529 U.S. at 407-408. The Court specified, however, that under this clause, "a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly-established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 410.

VI. MERITS

A. Ineffective Assistance of Counsel for Improperly Advising Petitioner to Not Take the Stand in His Own Defense

Petitioner first alleges that he has been denied the effective representation of competent counsel due to counsel's

failure to call him to testify on his own behalf. Upon further inquiry into this claim, we find it to be without merit.

The right to have effective assistance of counsel is a fundamental right provided for by the Sixth Amendment of the United States Constitution. In the case of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984), the United States Supreme Court set forth a two-prong test – both of which must be satisfied – by which ineffective assistance of counsel claims are judged. First, petitioner must demonstrate that his trial counsel's performance fell below an "objective standard of reasonableness." Strickland, 466 U.S. at 688. The Supreme Court has explained that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S. Ct. 158, 164 (1955)). Strategic and tactical decisions are not grounds for an ineffective assistance claim unless counsel displayed "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles." Holland v. Horn, 150 F. Supp. 2d 706, 727 (E.D. Pa. 2001) (quoting Commonwealth of the Virgin Islands v. Weaterwax, 20 F. 3d 572, 579 (3d Cir. 1994)).

The second prong of the test requires petitioner to prove that the allegedly deficient performance actually prejudiced the defense. To do so, petitioner must demonstrate that counsel's errors were so serious as to deprive him/her of a fair trial or a trial whose result is reliable. Strickland, 466

U.S. at 687. In other words, petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

As in the case before the Court, an allegation of ineffectiveness may arise from an attorney's failure to call his or her client to the stand in his own defense. A criminal defendant has a constitutional right to testify on his own behalf, a right which may only be waived by the defendant. Rock v. Arkansas, 483 U.S. 44, 50-53, 107 S. Ct. 2704, 2708-2710 (1987); United States v. Pennycooke, 65 F.3d 9, 10 (3d Cir. 1995). Because the right to testify finds its foundation in the Constitution and the mandates of Due Process, a defendant's waiver of that right must be knowing and intelligent. Pennycooke, 65 F.3d at 11. "The duty of providing such advice [on whether to testify] and of ensuring that any waiver is knowing and intelligent rests with defense counsel." Id. at 13. A dual presumption remains, however, that where a defendant is represented by counsel, counsel has presumably discussed the defendant's right to testify with him and defendant voluntarily and intelligently waived that right. United States v. Hatcher, Crim. A. No. 94-173-1, 1997 WL 698488, *3 (E.D. Pa. Nov. 7, 1997) (citing Pennycooke, 65 F.3d at 12-13). Consequently, to succeed on a claim of ineffective assistance for failure to allow defendant to testify, the petitioner must overcome these presumptions. Hatcher, 1997 WL 698488, at *3. Moreover, the petitioner must demonstrate prejudice by putting forth more than just a "bald assertion" that he was not allowed to testify, including some specifics as to what his testimony would have been. Id. (citing Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991); Granada v. United States, 51 F.3d 82, 85 (7th Cir. 1995), cert. Denied, 516 U.S. 1139, 116 S. Ct. 970 (1996)).

Petitioner, in the case at bar, raised this identical ineffectiveness claim to the Pennsylvania state courts who found that counsel had acted in a professional and effective manner by not calling petitioner to the stand. In its written opinion, the state trial court first noted that, although

petitioner would have been given the chance to deny the accusation against him had he testified, his testimony would have opened him up to cross-examination about his admitted sexual relationship with the victims' mother, who was also the purported common law wife of his friend and co-conspirator. Trial Court Opinion, at p. 15. Such evidence would have undermined the defense's claim that petitioner maintained a good character for chastity and respect for family values. The trial court went on to rule that testifying could have also drawn attention to petitioner's repeated visits to the victims' home, as well as has his continued relationship with his co-conspirator, and the victims' father, while the father was in jail on charges of molestation. Finally, the state court recognized that petitioner made his own decision not to testify, after full discussion about the pros and cons of doing so with his attorneys. Id. at 14. Ultimately, the court concluded, in light of these facts, that counsel acted reasonably in not calling him to the stand. Id, at 15.

Rejecting the state court's analysis, petitioner's habeas petition maintains that counsel effectively denied him his right to testify by providing false advice. Specifically, he alleges that trial counsel induced him not to testify by advising him that the Commonwealth, on cross-examination, would have elicited evidence of the consensual sexual liaison between petitioner and the mother of the two victims, thereby undermining his claims of good character. This advice, he argues, was erroneous since, under Pennsylvania Rules of Evidence 608 and 609, any such evidence of his sexual liaison was inadmissible. Because counsel's claimed basis for advising petitioner not to testify clearly constituted a mistake of law, counsel could have had no reasonable strategy for recommending against petitioner's taking the stand.

Additionally, petitioner challenges the trial court's finding that he made his own decision not to testify after consultation. He claims that the consultation was "ambiguous and tentative at best." Brief in Support of Petition for Writ Habeas Corpus, at p. 11. He further maintains that there is no

excuse for the fact that the attorney's understanding and resulting advice was erroneous. Id

Finally, petitioner contends that his attorney's actions worked a substantial prejudice to his defense. The Commonwealth offered only two witnesses – the victims themselves – in support of their case. Had petitioner testified, he would have been able to deny the charges and allow the jury decide his truthfulness. Due to counsel's allegedly improper recommendation, however, the jury had the benefit of hearing only one side of the story.

This Court finds petitioner's analysis to be flawed in several respects. First, petitioner improperly cites Pennsylvania Rules of Evidence 608 and 609 for the proposition that any evidence of his consensual sexual liaison with the mother of the two children was inadmissible and, thus, not a basis for his counsel to advise him not to testify. Quite contrary to petitioner's argument, however, Rule 608(b)(2) provides as follows:

> Except as provided in Rule 609 (relating to evidence of conviction of crime),
>
> (1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness' conduct; however,
>
> (2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

PA. R. Evid. 608 (emphasis added). Rule 609 merely expands on Rule 608 to discuss impeachment of a witness by evidence of a crime or conviction. Pa. R. Evid. 609. Thus, the only evidence contemplated by Rules 608 and 609 is that used for purposes of challenging the credibility or truthfulness of a

witness's testimony. Commonwealth v. Harris, 785 A.3d 988, 1000 (Pa. Super. Ct. 2001); 22 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, §5236 (1978).

Where, on the other hand, the character evidence sought to be introduced is substantive evidence of traits relevant to the crime of which the defendant is charged, its admissibility is governed by Pa. R. Evid. 404. Harris, 785 A.2d at 1000. Pennsylvania Rule of Evidence 404(a) states, in pertinent part:

> (a) Character Evidence Generally
>
> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except as follows:
>
> > (1) Character of Accused. In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same.

PA. R. EVID. 404(a)(1) (emphasis added). Pursuant to this rule, the accused in a criminal case may introduce evidence of his own good character in order to suggest the inference that someone with good character would not have committed the crime with which the accused is charged. Government of Virgin Islands v. Grant, 775 F.2d 508, 511 (3d Cir. 1985).

By introducing evidence of his good character, however, the criminal defendant opens himself to rebuttal by proof that his character is bad. See 42 Pa.C.S. §5918 (1982). ("No person charged with any crime and called as a witness in his own behalf, shall be asked, or if asked shall be required to answer, any question . . . tending to show that he has been of bad character or reputation unless . . . he shall have at such trial . . . given evidence tending to prove his own good character or reputation"); see also Commonwealth v. Morgan, 739 A.2d 1033, 1036 (Pa. 1999), 22 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE §5236 (1978). Pennsylvania Evidence Rule 405 goes on to note that, on

cross-examination of a witness testifying as to character, "inquiry is allowable into relevant specific instances of conduct." Pa. R. Evid. 405. As such, where a defendant has character witnesses testify as to a pertinent trait of his good character, the prosecution may cross-examine that witness or the testifying defendant using specific instances of conduct to rebut the showing of good character. See, e.g., United States v. Polin, 824 F.Supp. 542, 550 (E.D. Pa. 1993) (in trial for defendant on charges of attempting to destroy a building by fire, prosecution was entitled to cross-examine him concerning his failure to file a federal income tax return in 1989, after defendant put on 11 character witnesses to testify as to his reputation as a law-abiding citizen); Commonwealth v. Fisher, 741 A.2d 1234, 1245 (Pa. Super. Ct. 1999) (prosecution could question capital murder defendant regarding tattoo of nickname "Kuda," which referred to a barracuda, and could state that a barracuda was a "nasty evil fish" to rebut inference of good character, where defendant presented testimony of his corrections counselor as to defendant's reputation for being kind and courteous and evidence that he was devoutly religious, and defense counsel characterized defendant as a war hero and a model prisoner); Com. v. Novasak, 606 A.2d 477, 487 (Pa. Super. Ct.), appeal denied, 616 A.2d 984 (Pa. 1997) (once defendant placed his character in issue via his own direct testimony, prosecution was entitled to exploit that opening on cross-examination and in closing).

In the case at bar, petitioner and his counsel presented a defense based primarily on character evidence of petitioner's reputation for chasteness. Defense counsel called no less than three witnesses who testified primarily that petitioner was very chaste and morally responsible, that he was very happy with his family, and that he was unlikely to engage in sex with someone other than his wife. By doing so, petitioner opened the door for rebuttal evidence by the prosecution as to his reputation for chasteness. Had counsel called petitioner to the stand to testify, it would have been permissible for the prosecution to cross-examine him as to this alleged by inquiring into his affair with the mother of the two victims.

Consequently, counsel's recommendation that petitioner not take the stand due to a potentially damaging cross-examination constituted legally correct and strategically sound advice that fell well within the realm of objectively reasonable conduct.

Second, even assuming *arguendo* that the evidence regarding petitioner's consensual affair was inadmissible, counsel's recommendation still rested on sound strategy. As noted by the state court, if petitioner had taken the stand, the prosecution would have had the opportunity to emphasize petitioner's repeated visits to the victims' home and underscore the relationship between petitioner and his co-conspirator – the father of the victims – which continued even after the father was in prison. In light of such a potential threat to the defense case, this fact alone constitutes sufficient justification for counsel's advice to petitioner.

Third and finally, the Court cannot ignore the state court's finding that petitioner made his own decision not to testify after full discussion with his attorneys. Although petitioner argues that his consultation with counsel was "ambiguous" and "tentative", the record belies his claim. At the evidentiary hearing on his post-trial motions, defense counsel testified as follows:

> I would say that we had numerous and I mean numerous discussions on whether or not he should take the stand or not. The last discussion that we had took place, I think, on the Wednesday or Thursday before the trial was to start. I never told Mr. McClure that he should not take the stand. We had numerous discussions on what would happen if he did and didn't take the stand. I believe on the Thursday, the last time that I talked to him, I called him and I said, Ed, we are going to get down to it and we've got to make a decision on whether or not you are going to take the stand. I cannot make this decision for you. I want you to talk it over with Jeanie and then we are going to talk again. I don't want to talk about it on the phone because I want you to talk to your wife about what we

are going to do 'cause she was an integral part of whatever we did.

I was in my daughter, Anita's bedroom sitting on the floor having this discussion with Mr. and Mrs. McClure and my statement, because they were both on the phone, and my statement to them was to go over the pros and cons of testifying and my – one of my statements and I knew it was – you know, you just look at these things as an afterthought. I said to him, if you don't take the stand, I – if you take the stand, I've covered myself but these are the alternatives. You need to make a decision. Their statement was, you are the lawyer, you tell us what to do. I can't tell you what to do.

It came down to he didn't take the stand. Does that mean I told him not to take the stand? No, I don't think so. It is my recollection that we had a long discussion about it. We went over the pros and cons and it came out that he wasn't going to take the stand.

(N.T. 10/19/98, pp. 26-28). Petitioner likewise testified at that hearing and conceded the truth of counsel's representations, as follows:

Q. Now before the trial occurred, did Mr. Garfield ever tell you that you should not take the stand and testify on your own behalf?

A. No, no.

Q. He never told you should take the stand?

A. Not directly that I should, no. He left it up to my decision. And myself not being a lawyer and like I just made the statement, never been in a courtroom before, it was kind of a wide-open door, a decision that was very hard for me to decide on.

Q. When did he let it up to your decision?

A. Right up until the last few minutes before the Court. He said, there is a possibility that he

might put me on the stand but it was recommended that I not take the stand.

Q. That's what he told you?

A. Yes.

(N.T. 10/19/98, p. 51).

In view of this testimony, petitioner has failed to rebut the presumption that his counsel discussed his right to testify with him and petitioner voluntarily and intelligently waived that right. Hatcher, 1997 WL 698488, at *3. Indeed, petitioner admitted that, based on counsel's advice, he made his own decision not to take the stand. Having already found that counsel's advice was both legally and strategically sound, we cannot conclude that counsel acted ineffectively. In turn, we find no basis for deeming the state court ruling on this issue to be either contrary to or an unreasonable application of federal law.

B. Denial of Due Process Under the Fourteenth Amendment Because the State Appellate Process Failed to Provide Adequate and Specific Reasons for Their Rulings in Response to a Specific Allegation of Error by the Trial Counsel.

Petitioner's second claim for habeas relief challenges not an error at trial, but rather the failure of the state courts to address his appellate arguments, allegedly in violation of the due process clause. More specifically, petitioner contends that throughout his state appeals, he consistently argued that counsel improperly advised him that he should not testify due to the threat of cross-examination regarding his affair with the victim's mother. Despite his repeated recitation of Pennsylvania Rules of Evidence 608 and 609 in support of his position, the state courts simply denied his claims without ever analyzing the impact of these rules. Accordingly, he now contends that the state judiciary failed to adjudicate the meanings of its own rulings which had "the direct effect of blinding appellate counsel in his ethical ability to properly advise his client as to appeals and appellate strategy . . ." Brief in Support Petition for Writ of Habeas Corpus, at p. 6.

Throughout his five pages of counseled argument, however, petitioner disregards the fact that the state courts did provide a thorough explanation for why his ineffective assistance of counsel claim lacked merit. Indeed, the Court held a lengthy evidentiary hearing and ultimately explained, via a written opinion, that counsel acted effectively in not calling petitioner to the stand based on (1) his relationship with the victims' family, (2) the character defense and petitioner's affair with the victims' mother; and (3) the fact that the decision was left to petitioner's discretion after full discussion with his trial attorneys.

Petitioner remains focused on the mere fact that the trial court did not address his argument under Rules 608 and 609 of the Pennsylvania Rules of Evidence. As set forth in detail above, however, Rules 608 and 609 simply do not apply to this case.[18] Sitting as a court of review, we cannot now fault the state courts for refusing to discuss a completely irrelevant and meritless argument raised by petitioner. Certainly, the actions of the state court were neither contrary to nor an unreasonable application of federal law. Consequently, we decline to award habeas relief on this ground.

Therefore, I make the following:

---

[18] Petitioner, apparently aware of the controlling nature of Rule 404 on the admissibility of the evidence, argues that Rule 404(a)(3), entitled "Character of Witness, specifically refers to the applicability of Rules 608 and 609 by providing that "[e]vidence of a pertinent trial of character of a witness is admissible as provided in . . . 608 (character and conduct of a witness) and 609 (evidence of conviction of crime)." Pa. R. Evid. 404(a)(3). What petitioner misunderstands, however, is that it is not section (a)(3) of Rule 404 that applies, but rather section (a)(1), entitled "Character of Accused." This latter section makes absolutely no reference to Rules 608 and 609, further underscoring the fact that they do not apply in this case.

RECOMMENDATION

AND NOW, this 21st day of May, 2002, IT IS RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas Corpus be DENIED AND DISMISSED. There is no probable cause to issue a certificate of appealability.

/s/ Charles B. Smith

CHARLES B. SMITH

UNITED STATES

MAGISTRATE JUDGE

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR D. McCLURE,	:	
Petitioner,	:	CIVIL ACTION
v.	:	
HARRY E. WILSON,	:	
SUPERINTENDENT, STATE	:	
CORRECTIONAL INSTITUTION	:	
AT CRESSON, PA, and THE	:	
DISTRICT ATTORNEY OF THE	:	
COUNTY OF CARON, and	:	
THE ATTORNEY GENERAL	:	
OF PENNSYLVANIA,	:	
Respondents	:	

ORDER

And now on this 4th day of February, 2003, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;
2. The Report and Recommendation is APPROVED and ADOPTED;
3. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is DENIED and DISMISSED;
4. As petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability.

Entered Feb 5, 2003
Clerk of Courts

/s/ William H. Yohn, Jr.
William H. Yohn, Jr., Judge

EXHIBIT "D"

Page 6

Can you tell me how many you had handled prior to Mr. McClure's case?

A I couldn't begin to tell you but in the Public Defender's Office I've been there for the last 16 years and I've handled quite a few.

Q Now, did Mr. McClure have any type of criminal record?

A No. not to my knowledge anyway.

Q Did Mr. McClure express his innocence to you?

A Continually.

Q Did he ever not express his innocence to you?

A No.

Q Now, during the time period that you represented Mr. McClure, did you ever suggest that Mr. McClure should not take the stand and testify on his own behalf?

A I believe Mr. Garfield and I discussed that and that was our suggestion, yes.

Q And why was that?

A Because we did not feel he would be a good witness.

Q Why?

A 'Cause he couldn't answer a lot of pointed questions that were put to him.

Q Such as?

Page 19

the wife give anything to the defense, anything relevant?

A We didn't feel that she would.

Q You wanted to call the stepdaughter. Did you want to call the stepdaughter for the sole purpose of showing that he wasn't molesting his stepdaughter?

A That is the best of my recollection, yeah.

Q Did you feel that was relevant to the case, to the defense?

A Not to the particular allegations and the time frame involved, no.

Q Were you concerned that if he, in fact, took the stand the cross-examination would have done great damage to your defense?

A Extremely concerned.

Q Did he admit to having intercourse with Susan O'Neill to the police.

A He admitted that to us.

Q Was part of the onslaught of your defense his reputation for chastity?

A Yes.

Q Would putting Mr. McClure on the witness stand have opened him up to the statement that he made about Susan O'Neill?

A We felt it would.

Q Would that have been entirely inconsistent

(Page 20)

with the defense?

A We felt it would.

MR. ADDY: Nothing further.

MR. HANKLE: Few questions, Your Honor.

THE COURT: Certainly.

REDIRECT EXAMINATION

BY MR. HANKLE:

Q Mere presence at the O'Neill residence, that was a reason you didn't want to put him on?

A We did not want to help the District Attorney in making out their case in establishing his presence at the residence.

Q But presence wouldn't mean the act occurred, is that correct?

A That puts him in the location and makes the testimony of the alleged victims more believable.

Q And with regard to Mrs. O'Neill, you felt that the fact that that may come out would have been damaging to him, is that correct?

A That is one of the factors we considered, yes.

Q I see. So in your mind did that mean that he did – he committed these crimes if he had sex with Mrs. O'Neill?

MR ADDY: Objection.

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing **Application for Certificate of Appealability** was served this 31day of March, 2003, by United States Mail, first class mail delivery, postage pre-paid, to the following individuals:

Harry E. Wilson, Superintendent,
State Correctional Institution at Cresson, PA
P.O. Box A
Old Route 22
Cresson, PA 16699-0001

Mike Fisher, Attorney General
Office of Attorney General
c/o Francis R. Filipi,
Senior Deputy Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

United States District Judge
William H. Yohn, Jr.
14613 United States Courthouse
601 Market Street
Philadelphia, PA 19106

United States Magistrate Judge
Charles B. Smith
3006 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Gary F. Dobias, District Attorney
Carbon County Courthouse
P.O. Box 36
Jim Thorpe, PA 18229

/s/ James R. Hankle
James R. Hankle, Esquire

APS-317 September 11, 2003

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDGAR D. MCCLURE C.A. No. 03-1638

v.

HARRY E. WILSON, ET AL.

(E.D. PA. CIV. NO. 02-CV-01206)

Present: SLOVITER, McKEE and SMITH,

Circuit Judges

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. §2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

MMW/LLB/cmd

ORDER

The request for a certificate of appealability is denied for failure to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). The habeas claims lack merit or are barred due to a procedural default for the reasons given by the Magistrate Judge and the District Court. Moreover, under all of the circumstances of the case, counsel's strategy to pursue a character defense and to not have appellant take the stand in his own defense was

not objectively unreasonable under Strickland v. Washington, 466 U.S. 668, 689-90 (1984).

By the Court,

/s/ D. Brooks Smith

Circuit Judge

Dated: October 23, 2003

Cmb/cc: JRH, DWA

October 23, 2003

United States Court of Appeals for the Third Circuit

To: James R. Hankle, Esq.

David W. Addy, Esq.

NOTICE OF ORDER

A Case Dispositive Order was entered today in case No. 03-1638 and a copy is enclosed herewith. If you wish to seek review by the Court of the Court's order, you may file a petition for rehearing. The procedure for filing a petition for rehearing is outlined below.

PETITION FOR REHEARING

(FRAP 40 and Third Circuit LAR 35 and IOP Chapter 9)

Rehearing by the Court in banc pursuant to Rule 40, Federal Rules of Appellate Procedure, is not favored. Third Circuit LAR 35.4. In regard to when rehearing by the court in banc might be granted, your attention is specifically directed to Third Circuit IOP Chapter 9:

IOP 9.3 Criteria for Rehearing in Banc.

IOP 9.3.1 This court strictly follows the precept of Rule 35(a), Federal Rules of Appellate Procedure and Local Appellate Rule 35.4, that rehearing in banc is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

IOP 9.3.2 This court does not ordinarily grant rehearing in banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

IOP 9.3.3 Rehearing in banc is ordinarily not granted when the only issue presented is one of state law.

Nor, except in rare cases, has the court granted a rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

IOP 9.5 Rehearing In Banc on Petition by Party.

IOP 9.5.1 It is presumed that a petition for rehearing before the panel or suggestion for in banc rehearing filed by a party as provided by Rule 35(b) or 40(a), Federal Rules of Appellate Procedure, requests both panel rehearing and rehearing in banc, unless the petition for panel rehearing under Rule 40(a) states explicitly that it does not request in banc rehearing under Rule 35(b).

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, pursuant to Third Circuit LAR 35.1 the petition shall contain, so far as is pertinent, the following statement of counsel:

"I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],

Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

The filing of petitions for rehearing or rehearing in banc is not favored. Rule 35, Federal Rules of Appellate Procedure and

Third Circuit LAR 35.4. Counsel is reminded that a duty is owed to the Court commensurate with that owed to their clients not to file petitions for rehearing in banc which do not meet the rigorous requirements of Rule 35, Federal Rules of Appellate Procedure and Third Circuit LAR 35.1

Attachments — Pursuant to Third Circuit LAR 32.3(b) and 35.2 attached to each petition for rehearing must be a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Filing Time — A petition for rehearing may be filed within 14 days of the date the Court's judgment or final decision was entered on the docket unless the appeal is a civil case in which the United States is a party. Rule 40(a), Federal Rules of Appellate Procedure. In a civil case in which the United States is a party, any petition for rehearing must be filed within 45 days of entry of the Court's final judgment or decision. Id. **These filing deadlines are calculated from the date of the enclosed order.** No extension will be granted save for the most compelling reasons. The petition must be received in the Clerk's office within the time permitted for filing a petition. A petition is filed as of the date of receipt and **not** of mailing.

Pursuant to Rule 35(c), Federal Rules of Appellate Procedure, any request for rehearing by the Court in banc must be filed at the same time that a petition for panel rehearing is filed. Neither the Court's rules nor its Internal Operating Procedures allow a process in which a subsequent request for rehearing in banc is filed after a petition for panel rehearing has been denied.

Form, Answer The 15-page limit allowed by the Rule shall be strictly observed. This page limit will also be applied to any answer that the Court may request be filed.

A petition for rehearing, and any answer thereto, must comply with the requirements of Rule 32(a), Federal Rules of Appellate Procedure and Third Circuit LAR 32.1 as to form, typeface, spacing, footnotes, etc. Colored covers are not required.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Rule 40(a), Federal Rules of Appellate Procedure. Oral argument in support of the petition will not be permitted.

Number of Copies

An original and 15 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Electronic Filing

Please refer to the Court's website www.ca3.uscourts.gov for instructions on the electronic filing of petitions for rehearing.

Certificate of Service for Institutional or Incarcerated Litigant

Certification of Service

In addition to including a certificate of service, all litigants who are currently institutionalized or incarcerated would include the following statement on all documents to be filed with this Court:

I certify that this document was given to prison officials on [date] for forwarding to the Court of Appeals. I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. Sec. 1746.

Marica M. Waldron
Clerk

By: /s/ Chiquita Dyer
Case Manager
Direct Dial 267-299-4919

Enclosure
Rev. 1/95

Received 10/28/03

James R. Hankle, Esq.
Sherrard, German & Kelly
3550 FreeMarkets Center
Pittsburgh, PA 15222

Received November 6, 2003

U.S.C.A. 3rd Cir.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDGAR D. McCLURE, CA No. 02-1206

Petitioner,

v.

HARRY E. WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, PENNSYLVANIA, AND THE DISTRICT ATTORNEY OF THE COUNTY OF CARBON, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

PETITION FOR REHEARING EN BANC

JAMES R. HANKLE, ESQUIRE
PA I.D. NO. 36019
SHERRARD, GERMAN
& KELLY, P.C.
35th Floor, FreeMarkets Center
Pittsburgh, PA 15222-2602
Firm No: 006
Attorney for Petitioner,
Edgar D. McClure

TABLE OF CONTENTS

TABLE OF CITATIONS.....ii
SCOPE OF REVIEW.....1
PROCEDURAL POSTURE.....2
FACTUAL SUMMARY.....3
ARGUMENT.....5

I. En Banc Consideration is Necessary to Secure or Maintain Uniformity of the Court's Decision and a Material Fact was Overlooked in the Decision.....5

A. Ineffective Assistance of Counsel.....5

B. The Multiple Failures of the State Appellate Courts and Federal Courts To Consider the Merits of Petitioner's Ineffective Assistance of Counsel Agument.....12

CONCLUSION.....14

APPENDIX

A. Judgment as to Which Rehearing En Banc is Sought

TABLE OF CITATIONS

Cases

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843 (2002).....9

Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992).....11

Commonwealth v. Bazabe, 404 Pa.Super. 408, 590 A.2d 1298 (1991).....9

Commonwealth v. Breisch, 719 A.2d 352, 1998 Pa.Super. LEXIS 2856.....9, 10, 12

Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990).....10

Commonwealth v. Mancini, 490 A.2d 1377 (Pa.Super 1985) 10

Commonwealth v. Martin, 346 Pa.Super. 129, 499 A.2d 344 (1985).....11

Commonwealth v. Neal, 421 Pa.Super. 478, 618 A.2d 438 (1992).....9, 10, 11

Dickerson v. Vaughn, et al, 90 F.3d 87 (3rd Cir. 1996).....8

Evitts v. Lucey, 469 U.S. 387 (1985).....13

Harris v. Rivera, 454 U.S. 339 (1987).....13, 14

Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991).....8

Strickland, et al v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).....9, 10, 13, 15

U.S. v. Marzgliano, 588 F.2d 395 (3rd Cir. 1978).....8

U.S. v. Valenciano, 495 F.2d 585 (3rd Cir. 1974).....8

Zilich v. Reid, 36 F.3d 317 (3rd Cir. 1994).....8

Statutes

28 U.S.C. §2253(c)(1).....13
42 Pa.C.S.A. §5918.....10

Rules of Procedure and Evidence

F.R.A.P. 35(a).....1
P.R.E. 404.....10
P.R.E. 608.....6
P.R.E. 609.....6

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

EDGAR D. McCLURE, :CA NO. 03-1638
Appellant, :E.D. Pa. Civ. No. 02-1206

v.

HARRY E. WILSON, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION
AT CRESSON, PENNSYLVANIA, and THE
DISTRICT ATTORNEY OF THE COUNTY OF CARBON, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Appellees.

PETITION FOR REHEARING EN BANC

Petitioner, Edgar C. McClure, by counsel, James R. Hankle, Esquire and Sherrard, German & Kelly, P.C. timely files the instant Petition for Rehearing En Banc from the October 23, 2003 Order by Circuit Judge D. Brooks Smith denying Petitioner's Request for Certificate of Appealability. This Petition sets forth strong basis for which this Petition for Rehearing En Banc is submitted and a summary of the arguments which Petitioner intends to present more fully upon the granting of a the within Petition.

SCOPE OF REVIEW

A Petition for Rehearing En Banc is designed to secure and/or maintain uniformity of the court's decisions of law or fact that it may have overlooked or to grant consideration to issues of exceptional importance. F.R.A.P. 35(a).

PROCEDURAL POSTURE

Petitioner's Appeal of a denial of a Habeas Corpus Petition arises out of the conviction of Petitioner in the Court of Common Pleas of Carbon County, Pennsylvania. Petitioner was represented during his trial by attorneys Michael Garfield

and Robert Yurchak. After only a three hour jury trial on June 9, 1998, Petitioner was found guilty of five counts of Rape, five counts of Statutory Rape, four counts of Involuntary Deviate Sexual Intercourse, nineteen counts of Indecent Assault, two counts of Corruptions of Minors, and two counts of Criminal Conspiracy.

Immediately following his conviction, Petitioner retained new counsel and post verdict motions were filed raising, *inter alia*, Petitioner's contention that he received ineffective assistance of counsel during his trial. Specifically, Petitioner asserted that trial counsel's failure to put Petitioner on the witness stand to testify in his own defense, a decision resulting directly from counsel's error of law, constituted ineffective assistance of counsel. The post verdict motions were ultimately denied by the trial court, and Petitioner was sentenced to a prison term of nineteen to thirty-eight years.

Petitioner appealed the denial of the post trial motions to the Superior Court of Pennsylvania, again raising and briefing his assertions that he had received ineffective assistance of counsel during his trial. The Superior Court, declining directly to address the legal arguments raised by Petitioner, adopted the trial court opinion in its entirety and affirmed on that basis. Petitioner subsequently sought appellate review by the Supreme Court of Pennsylvania, again raising the issue of ineffective assistance of counsel, but that Court declined to hear Petitioner's appeal. Petitioner then filed a Writ of Certiorari to the United States Supreme Court but review was denied.

On January 30, 2001, Petitioner reasserted his arguments before the Pennsylvania trial court under the Post Conviction Collateral Relief Act ("PCRA"). On February 27, 2001, the trial court summarily denied the PCRA Petition without a hearing. Upon appeal of that denial to the Superior Court of Pennsylvania, the Superior Court denied relief without granting any oral argument on the matter.

Having exhausted his avenues of direct appeal, Petitioner, on March 8, 2002, timely filed his first and only Federal Habeas Corpus Petition in the United States District

Court for the Eastern District of Pennsylvania. In his Petition, Petitioner continued to assert his argument regarding ineffective assistance of counsel and further asserted that the multiple failures of the state appellate courts to consider the legal merits of his ineffective assistance of counsel argument constituted a violation of Petitioner's Due Process.

On May 22, 2002, Magistrate Judge Charles B. Smith issued a Report and Recommendation denying Petitioner relief without a hearing. After consideration of Petitioner's objections thereto, on February 4, 2003, the Honorable William J. Yohn, Jr. issued an Order approving and adopting the Magistrate's Report and Recommendation. Judge Yohn's Order further stated that no Certificate of Appealability would issue.

Petitioner timely filed a Notice of Appeal from the Order of the District Court to the Court of Appeals for the Third Circuit, which was summarily denied October 23, 2003. This timely and substantiated Petition for Rehearing En Banc follows.

FACTUAL SUMMARY

The charges upon which Petitioner was prosecuted arose from allegations that Petitioner had repeatedly sexually assaulted two minor children over the period of several years. The undisputed evidence at trial established that Petitioner, who had no prior criminal record, had been a friend of the father of the victims and had visited the home of the victims several times during the period in question. The totality of the Commonwealth's case against Petitioner consisted solely of the testimony of the two female victims. In defense, Petitioner's trial counsel relied solely on the testimony of a handful of character witnesses who testified to Petitioner's good reputation and chastity within the community. Counsel advised Petitioner against taking the witness stand to rebut the testimony of the Commonwealth's witnesses or to provide any exculpatory testimony in his own defense.

At hearing on Petitioner's post-trial motions, trial counsel admitted that they advised Petitioner against testifying in his own defense at trial:

Q. Now, during the time period that you represented Mr. McClure, did you ever suggest that Mr. McClure should not take the stand and testify on his own behalf?

A. (Mr. Yurchak) I believe Mr. Garfield and I discussed that and that was our suggestion, yes.

(N.T. 10/19/98, p. 6).

Defense counsel attributed this decision to concern that if Petitioner took the stand, he would be exposed to cross-examination or rebuttal evidence regarding an extra-marital consensual liaison in which he had engaged with the common law wife of the father of the two victims:

Q. Would putting Mr. McClure on the witness stand have opened him up to the statement that he made about Susan O'Neill?

A. (Mr.Yurchak) We felt it would.

(N.T. 10/19/98, p. 19).

* * *

Q. And with regard to Mrs. O'Neill, you felt that the fact that may come out would have been damaging to him, is that correct?

A. That is one of the factors we considered, yes.

(N.T. 10/19/98, p. 20).

As a result of trial counsel's unfounded concern, Petitioner did not take the stand and dispute the prosecution's elicited facts. Rather, trial counsel unreasonably induced Petitioner not to testify and fell back on a character defense.

ARGUMENT

I. En Banc Consideration is Necessary to Secure or Maintain Uniformity of the Court's Decision and a Material Fact was Overlooked in the Decision

A. Ineffective Assistance of Counsel

I express a belief, based on my reasoned and studied professional judgment, that the appeal decision, attached as Exhibit "A" in the Appendix of this Petition, is based on a misapprehension of the facts in this case and En Banc consideration is necessary to secure and/or maintain uniformity of the court's decisions. This misapprehension was undoubtedly based upon the District Court's mistaken position that Petitioner was attempting to assert a new argument in its Objections to the District Court's Opinion. In truth, Petitioner's Objections attempted to clarify for the District Court what Petitioner has consistently argued throughout his post-conviction proceedings.

Specifically, the District Court overlooked the fact that Petitioner has consistently made the argument that his trial counsel, while operating under a mistake of applicable law, advised Petitioner not to exercise his right to take the stand in his own defense. It was this mistake of law which directly led trial counsel to then assert a character defense, leaving the prosecution's factual allegations and witnesses completely unchallenged.

Petitioner's defense was premised on trial counsel's underlying mistake of applicable law. Specifically, trial counsel advised Petitioner not to testify on his own behalf primarily because trial counsel believed to do so would subject Petitioner to cross-examination regarding Petitioner's consensual extra-marital affair with another adult. Undoubtedly, such evidence would clearly be inadmissible as irrelevant, and would further be barred under other applicable Pennsylvania Rules of Evidence, including Pa.R.E. 404, 608, and 609. As discussed below, any competent attorney, operating within the broad range of reasonableness, would not have advised Petitioner not to take the stand based upon this

mistaken belief as to well-settled Pennsylvania evidentiary rules.

As argued in the state court action and in this Habeas Corpus action, it was his mistaken belief that Petitioner would be subject to cross-examination regarding the consensual extra-marital affair that led Petitioner's trial counsel to fall back on a character defense. The District Court itself clearly recognized that "if the trial attorneys believed what [P]etitioner now claims they did, and this misconception motivated [P]etitioner's decision not to testify, then the attorneys may have been incorrect as to the law." This is an express recognition of the soundness of Petitioner's argument.

Notwithstanding this recognition, the District Court then falsely claimed that "this is a different issue than those raised in the post-conviction state proceedings and in [P]etitioner's federal petition and one for which no factual or legal basis is presented in the record before the court." The decision of this Court likewise vaguely states that Petitioner's claims lack merit or are procedurally barred. This is incorrect. In fact, a tracing back of the state and federal post-conviction proceedings clearly demonstrates that Petitioner has consistently taken the position that trial counsel's underlying mistake of law kept Petitioner off the stand and directly resulted in the assertion of a character defense. For example, Petitioner's post-conviction Pennsylvania Supreme Court filings expressly stated that character witnesses were used "*...because of a defense decision not to put the accused on the stand..*", and "[t]hat was the sum of his defense: his good character." (emphasis added). Similarly, in a filing with the Pennsylvania Superior Court, Petitioner also stated that cross-examination regarding the extra-marital affair, "...clearly would be inadmissible as irrelevant.." and "[t]he evidence of such an encounter could have come in *only if the defense raised the issue first*, an act of ineffectiveness." (emphasis added).

This argument was also asserted in Petitioner's Brief in Support of Habeas Corpus originally submitted to the Federal District Court for the Eastern District of Pennsylvania.

Specifically, Petitioner clearly stated, "[t]he point is that *the original error regarding a misstatement of the law led his client not to make any statement whatsoever.*" (emphasis added). Further, "[a]s a matter of Due Process, there was no fair opportunity at trial to obtain an adjudication on the merits of Petitioner's case because he was misled into not testifying on his own behalf to offer his testimony into evidence."

Accordingly, Petitioner has not waived this argument, in either the state court post-conviction proceedings or in these Habeas Corpus proceedings. The District Court's mistaken ruling has been granted undue deference by this Court that it is not owed, as the pleadings evidence, exampled above. Based solely upon this issue, it is highly prejudicial to Petitioner for this and other courts to continue to claim that "the habeas claims lack merit or are barred due to a procedural default for the reasons given by the Magistrate Judge and the District Court." This is especially true given the District Court's recognition that, "if the trial attorneys believed what [P]etitioner now claims they did, and this misconception motivated [P]etitioner's decision not to testify, then the attorneys may have been incorrect as to the law."

To continue to claim this habeas corpus proceeding lacks merit and/or is procedurally barred results in extreme prejudice to Petitioner and is not a uniform application of state and federal law. To the contrary, the Third Circuit Court of Appeals has expressly held that a counsel's misrepresentation of applicable law vitiates the voluntariness of an accused's decision. Dickerson v. Vaughn, et al, 90 F.3d 87, 92 (3rd Cir. 1996). Dickerson involved a plea agreement under which the defendant was not advised that a plea of nolo contendere prevented any appeal of a pre-trial ruling. Id. at 89-90. The state argued that the defendant's execution of the colloquy barred such an argument. Id. This Court ultimately held that the misrepresentation by defendant's counsel of applicable law about the appealability of double jeopardy once the guilty plea was entered vitiated the voluntariness of the plea unless the state trial court addressed the point so clearly that it clearly cancelled out the mistaken advice of counsel. Id. at 91-92.

This Court also cited several cases where it held that guilty pleas are not voluntary when they are *induced by misleading statements of defense counsel.* Id. at 91 *citing* Zilich v. Reid, 36 F.3d 317, 320-321(3rd Cir. 1994); Lesko v. Lehman, 925 F.2d 1527, 1537 (3rd Cir. 1991); U.S. v. Marzgliano, 588 F.2d 395, 399 (3rd Cir. 1978); U.S. v. Valenciano, 495 F.2d 585, 587 (3rd Cir. 1974). (emphasis added). This principle clearly extends to the instant issue, wherein misleading statements of trial counsel induced Petitioner not to take the stand. Therefore, the decision not to testify, assuming arguendo Petitioner in fact made it, was not voluntarily and knowing.

Pennsylvania courts agree with this principle, holding that a decision whether to testify in one's own behalf is ultimately to be made by the accused after full consultation with counsel.[19] Commonwealth v. Neal, 421 Pa.Super. 478, 618 A.2d 438 (1992) *citing* Commonwealth v. Bazabe, 404 Pa.Super. 408, 590 A.2d 1298 (1991). Further, and most importantly, Pennsylvania law clearly states, "*[i]n order to support a claim that counsel was ineffective for 'failing to call the appellant to the stand', [appellant] must demonstrate* either that (1) counsel interfered with his client's freedom to testify, or (2) *counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision by the client not to testify in his own behalf.*" Neal, 421 Pa.Super. 483. (citations omitted) (emphasis added).

That is exactly the present case. Petitioner was given specific advice by trial counsel that was based on a mistake of law so unreasonable that it vitiated Petitioner's somewhat ambiguous decision not to testify on his own behalf. (assuming arguendo that Petitioner in fact made the decision after full consultation) This satisfies the Strickland test for ineffectiveness of counsel.

Under the two-part Strickland test, a sufficient indication that a trial counsel's assistance was defective

---

[19] The right to testify on one's own behalf is a sacred right conferred upon citizens by both the Pennsylvania and United States Constitutions. Commonwealth v. Breisch, 719 A.2d 352, 357, 1998 Pa.Super. LEXIS 2856.

enough to undermine confidence in the proceeding's result is evidenced by a petitioner's showing that the trial counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for trial counsel's professional errors, the result of the proceeding would have been different.[20] Bell v. Cone, 535 U.S. 685, 695, 122 S.Ct. 1843 (2002) *citing* Strickland, et al v. Washington, 466 U.S. 668, 688, 694, 104 S.Ct. 2052 (1984).

Petitioner's trial counsel representation fell well below the Strickland standard as outlined above, as there is no conceivable manner in which Petitioner could have been subject to cross-examination regarding his consensual extra-marital affair with another adult absent the defense "opening the door."[21]

Specifically, the Pennsylvania Rules of Evidence, in conjunction with 42 Pa.C.S.A. §5918 (1982), govern the admissibility of evidence regarding Petitioner's extra-marital liaison. Where, as here, the crimes at issue do not concern the character of the accused, the Commonwealth is precluded from introducing any evidence as to the character of the accused unless it seeks to rebut character evidence introduced by the accused. *See*, P.R.E. 404; 42 Pa.C.S.A. §5918. In the

---

[20] Given the prosecution's wholly unrebutted case, the prejudice to the Petitioner undoubtedly exists, as his mere three (3) hour trial resulted in a prison sentence of 19 to 38 years.

[21] In addition, courts have held where an error of law results in a decision that the accused will not take the stand in his won defense, both federal and Pennsylvania state law recognize the inherent ineffectiveness of counsel. See; Commonwealth v. Neal, 618 A.2d 438 (Pa. Super 1992) (where Defendant had no criminal record that could be impeached, it is ineffective assistance of counsel not to advise the defendant to take the stand); Commonwealth v. Holloway, 572 A.2d 687 (Pa. 1990); Commonwealth v. Breisch, 719 A.2d 352 (Pa. Super 1998) (where Defendant lacked a criminal record that could have been impeached, was also not advised of her constitutional right to testify, faced a situation at trial where the outcome turned on the credibility of the victim, had a defense based on character, and also did not defend herself by testifying); Commonwealth v. Mancini, 490 A.2d 1377, 1386 (Pa. Super 1985) (recognizing that defense counsel could be ineffective without full consultation even if defendant decided not to testify

event the accused "opens the door" to the Commonwealth's introduction of such evidence, the Commonwealth is permitted to introduce evidence of specific acts of the accused. *See*, P.R.E. 404(a)(1); 42 Pa.C.S.A. §5918. Thus, in a case such as Petitioner's, the Commonwealth is precluded from introducing evidence pertaining to the accused's character if the accused does not first introduce evidence of his character. Ironically, trial counsel himself may have actually "opened the door" by his institution of a character defense, although this "cracked door" was not exploited by the prosecution.

Trial counsel's mistaken belief that Petitioner would be subject to cross-examination about his extra-marital affair directly led trial counsel to advise Petitioner not to take the stand and *instead* rely upon a character defense. Had trial counsel understood the well-settled evidentiary principles of relevance, specifically with respect to the Petitioner's extra-marital affair, and had trial counsel correctly advised Petitioner accordingly, the character defense would not have been fallen back on. This was not a decision within the realm of sound trial strategy. *See*, e.g. Commonwealth v. Martin, 346 Pa.Super. 129, 140, 499 A.2d 344 (1985); Cave v. Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992). Errors of law by counsel cannot be protected against ineffective assistance of counsel claims merely by being masked as "strategy." Where the error by counsel is not tactical but rather is an unacceptable legal blunder, such as when the lawyer fails to do proper research and ends up misunderstanding the law, counsel's ineffectiveness is manifest. Rather, the misapplication of applicable law relied upon by trial counsel in his specific advice to Petitioner was so unreasonable that it vitiated Petitioner's ability to voluntarily and knowingly relinquish his right to testify on his own behalf.

Trial counsel testified that they were concerned that a decision to put Petitioner on the witness stand would subject him to cross-examination on the issue of Petitioner's affair with the mother of the victims. Analysis of the relevant law,

however, indicates that counsel's decision was misplaced. Counsel's advice to Petitioner, tainted by that mistake of law, nevertheless dissuaded Petitioner from exercising his constitutional right to testify in his defense and constitutes ineffective assistance of counsel.

The nature of the prosecution makes even more evident the prejudice Petitioner has suffered. Where, as here, the outcome of the case turns on the credibility of the victim, the defendant's right to testify is of the utmost importance. See Neal, 618 A.2d 438 (holding that where the defendant's testimony would have rebutted the victim's incriminating testimony, the defendant's testimony was considered essential defense testimony); Breisch, 719 A.2d 352. As in Neal, the sole evidence put forth by the Commonwealth consisted solely of the testimony of the two victims and Petitioner's testimony was essential to defense against those charges. That Petitioner was advised not to offer such testimony because his lawyers misunderstood Petitioner's exposure to cross-examination constitutes ineffective assistance of counsel.

Accordingly, Petitioner's argument outlined above is not procedurally barred. Further, under settled state and federal legal principles, trial counsel's misapplication of applicable law was directly relied upon by Petitioner, resulting in a character defense. This misapplication vitiated Petitioner's ability to knowingly and voluntarily relinquish his right to testify on his own behalf. For these reasons, Petitioner respectfully requests this Honorable Court grant his Petition for Rehearing En Banc.

B. The Multiple Failures of the State Appellate Courts and Federal Courts To Consider the Merits of Petitioner's Ineffective Assistance of Counsel Argument

This Court's brief denial failed to address this argument and/or barred it procedurally. Again, this argument has been consistently asserted in Petitioner's post-conviction proceedings but has yet to be substantively addressed. This is wholly inconsistent with prevailing legal principles.

This misapprehension of law began with the trial court's opinion following post trial motions, wherein the trial court found that Petitioner's counsel had been effective by not calling Petitioner to the stand based on (1) Petitioner's preexisting relationship with the victims' family; (2) Petitioner's liaison with the victims' mother; and (3) the conclusion that the decision was left to Petitioner's discretion after full discussion with his trial attorneys. In so holding, the trial court illustrated that it failed to understand that Petitioner contended that the decision not to take the stand, and instead to assert a character defense, was based on specific and erroneous legal advice Petitioner received from counsel. While the trial court embarked on a cogent discussion of the circumstances under which the Commonwealth may cross-examine an accused regarding specific acts, it did not address that Petitioner's character would not have been injected into the trial had counsel not advised Petitioner against taking the stand in his own defense on the basis of a misunderstanding of law. That failure, and the appellate courts' failure to address the merits of Petitioner's arguments, or to offer any opinion as to those arguments, violated Petitioner's Due Process rights. Petitioner believes and therefore avers that this Court's cursory denial of appealability under 28 U.S.C. §2253(c)(1) wrongfully continues this trend. Petitioner's argument is supported by well-established law, as set forth below.

Where a state acts in the appellate process, it must do so within the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 404 (1985) (reversing the long-held view that the Federal Constitution has no concern for a state's appellate process or rights). As stated in Strickland, "[t]he Constitution guarantees a fair trial largely though the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment..." Strickland, 466 U.S. at 684-685. It naturally follows that the convergence in Strickland of principles of Due Process and Effective Assistance of Counsel, to ensure a fair trial, extends to appellate procedures as well.

Federal courts have no supervisory power over state trial courts. In Harris v. Rivera, however, the United States Supreme Court explained that

> the work of appellate judges is facilitated when trial judges make findings of fact that explain the basis for controversial rulings . . . [but] there are occasions when an explanation for a decision may be required by the demands of due process.

Harris, 454 U.S. at 344 (emphasis added). Though the Supreme Court noted in Harris that the occasion for such explanations are "the exception rather than the rule," the possibility that such exceptions exist cannot be denied. Indeed, where appellate counsel makes a valid, record-based argument that an error of law by trial resulted in ineffective assistance of counsel that manifestly prejudiced the accused's defense, it is difficult to conceive of a more appropriate occasion to infer the necessity of such an explanation.

Here, due to the failure of the state and federal courts to consider or address the specific arguments raised by Petitioner, Petitioner has been forced to appeal the lower courts' adverse rulings without actually understanding the legal bases for those holdings. The summary disposition of each of Petitioner's appeals, absent any evidence of any undertaking to address the legal claims raised therein, violates the essential notions of Due Process and the Petitioner's right to a fair trial. Accordingly, if this Court grants Petitioner's Petition for Rehearing En Banc, Petitioner believes he will establish that the multiple failures of the Pennsylvania appellate courts, and now the courts in this habeas corpus petition, to address the arguments Petitioner has properly raised, arguments which have not yet been properly addressed by any court, violated Petitioner's right to Due Process.

CONCLUSION

Petitioner submits that he has substantially demonstrated the deprivation of two constitutional rights: the right to effective assistance of counsel and the right to due process. On appeal, Petitioner will establish that his trial

counsel's performance dropped well below the objective standard contemplated by the Court in Strickland. Specifically, Petitioner's counsel, operating under a fundamental mistake of law, advised Petitioner not to take the witness stand in his own defense and the consequent decision not to take the stand prejudiced Petitioner's defense. Also on appeal, Petitioner will establish that the multiple failures of the state courts to consider and address in written opinions the legal arguments put forth by Petitioner so violated fundamental notions of fair play as to constitute a violation of his right to Due Process and a fair trial. Specifically, Petitioner will establish that neither of these arguments are procedurally barred or lack merit.

Accordingly, Petitioner respectfully requests that this Honorable Court issue a Certificate of Appealability and set a briefing schedule for Petitioner's appeal of the District Court's denial of Petitioner's Habeas Corpus Petition.

Respectfully submitted,

SHERRARD, GERMAN & KELLY, P.C.

/s/ James R. Hankle, Esquire

James R. Hankle, Esquire
Attorney for Plaintiff
PA I.D. No. 36019
Two PNC Plaza, 28th Floor
Pittsburgh, PA 15222-2602
(412) 355-0200

EXHIBIT "A"

APS-317 **September 11, 2003**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EDGAR D. MCCLURE C.A. No. 03-1638

v.

HARRY E. WILSON, ET AL(E.D. PA. CIV. NO. 02-CV-01206)

Present: SLOVITER, McKEE and SMITH, Circuit Judges

Submitted is appellant's request for a certificate of appealability under 28 U.S.C. §2253(c)(1) in the above-captioned case.

Respectfully,

Clerk

MMW/LLB/cmd

ORDER

The request for a certificate of appealability is denied for failure to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2). The habeas claims lack merit or are barred due to a procedural default for the reasons given by the Magistrate Judge and the District Court. Moreover, under all of the circumstances of the case, counsel's strategy to pursue a character defense and to not have appellant take the stand in his own defense was not objectively unreasonable under Strickland v. Washington, 466 U.S. 668, 689-90 (1984).

By the Court,

/s/ D. Brooks Smith

Circuit Judge

Dated: October 23, 2003

Cmb/cc: JRH, DWA

October 23, 2003

United States Court of Appeals for the Third Circuit

To: James R. Hankle, Esq.

David W. Addy, Esq.

NOTICE OF ORDER

A Case Dispositive Order was entered today in case No. 03-1638 and a copy is enclosed herewith. If you wish to seek review by the Court of the Court's order, you may file a petition for rehearing. The procedure for filing a petition for rehearing is outlined below.

PETITION FOR REHEARING

(FRAP 40 and Third Circuit LAR 35 and IOP Chapter 9)

Rehearing by the Court in banc pursuant to Rule 40, Federal Rules of Appellate Procedure, is not favored. Third Circuit LAR 35.4. In regard to when rehearing by the court in banc might be granted, your attention is specifically directed to Third Circuit IOP Chapter 9:

IOP 9.3 Criteria for Rehearing in Banc.

IOP 9.3.1 This court strictly follows the precept of Rule 35(a), Federal Rules of Appellate Procedure and Local Appellate Rule 35.4, that rehearing in banc is not favored and will not be ordered unless consideration by the full court is necessary to secure or maintain uniformity of its decisions or the proceeding involves a question of exceptional importance.

IOP 9.3.2 This court does not ordinarily grant rehearing in banc when the panel's statement of the law is correct and the controverted issue is solely the application of the law to the circumstances of the case.

IOP 9.3.3 Rehearing in banc is ordinarily not granted when the only issue presented is one of state law.

Nor, except in rare cases, has the court granted a rehearing in banc where the case was decided by a judgment order, a memorandum opinion, or unpublished per curiam opinion.

IOP 9.5 Rehearing In Banc on Petition by Party.

IOP 9.5.1 It is presumed that a petition for rehearing before the panel or suggestion for in banc rehearing filed by a party as provided by Rule 35(b) or 40(a), Federal Rules of Appellate Procedure, requests both panel rehearing and rehearing in banc, unless the petition for panel rehearing under Rule 40(a) states explicitly that it does not request in banc rehearing under Rule 35(b).

Statement of Counsel

Where the party petitioning for rehearing in banc is represented by counsel, pursuant to Third Circuit LAR 35.1 the petition shall contain, so far as is pertinent, the following statement of counsel:

"I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court or the Supreme Court in [citing specifically the case or cases],

Or, that this appeal involves a question of exceptional importance, to-wit [set forth in one sentence]."

The filing of petitions for rehearing or rehearing in banc is not favored. Rule 35, Federal Rules of Appellate Procedure and

Third Circuit LAR 35.4. Counsel is reminded that a duty is owed to the Court commensurate with that owed to their clients not to file petitions for rehearing in banc which do not meet the rigorous requirements of Rule 35, Federal Rules of Appellate Procedure and Third Circuit LAR 35.1

Attachments — Pursuant to Third Circuit LAR 32.3(b) and 35.2 attached to each petition for rehearing must be a copy of the judgment, order or decision of the Court as to which rehearing is sought and any memorandum or opinion of the court stating the reasons therefor.

Filing Time — A petition for rehearing may be filed within 14 days of the date the Court's judgment or final decision was entered on the docket unless the appeal is a civil case in which the United States is a party. Rule 40(a), Federal Rules of Appellate Procedure. In a civil case in which the United States is a party, any petition for rehearing must be filed within 45 days of entry of the Court's final judgment or decision. Id. **These filing deadlines are calculated from the date of the enclosed order.** No extension will be granted save for the most compelling reasons. The petition must be received in the Clerk's office within the time permitted for filing a petition. A petition is filed as of the date of receipt and **not** of mailing.

Pursuant to Rule 35(c), Federal Rules of Appellate Procedure, any request for rehearing by the Court in banc must be filed at the same time that a petition for panel rehearing is filed. Neither the Court's rules nor its Internal Operating Procedures allow a process in which a subsequent request for rehearing in banc is filed after a petition for panel rehearing has been denied.

Form, Answer The 15-page limit allowed by the Rule shall be strictly observed. This page limit will also be applied to any answer that the Court may request be filed.

A petition for rehearing, and any answer thereto, must comply with the requirements of Rule 32(a), Federal Rules of Appellate Procedure and Third Circuit LAR 32.1 as to form, typeface, spacing, footnotes, etc. Colored covers are not required.

The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. No answer to a petition for rehearing will be received unless requested by the court. Rule 40(a), Federal Rules of Appellate Procedure. Oral argument in support of the petition will not be permitted.

Number of Copies

An original and 15 copies of a petition for rehearing before the Court in banc is required.

An original and 3 copies of a petition for rehearing before the original panel is required.

Electronic Filing

Please refer to the Court's website www.ca3.uscourts.gov for instructions on the electronic filing of petitions for rehearing.

Certificate of Service for Institutional or Incarcerated Litigant

Certification of Service

In addition to including a certificate of service, all litigants who are currently institutionalized or incarcerated would include the following

statement on all documents to be filed with this Court:

I certify that this document was given to prison officials on **[date]** for forwarding to the Court of Appeals. I certify under penalty of perjury that the foregoing is true and correct. 28 U.S.C. Sec. 1746.

Marica M. Waldron

Clerk

By: /s/ Chiquita Dyer

Case Manager

Direct Dial 267-299-4919

Enclosure

Rev. 1/95

Received 10/28/03

James R. Hankle, Esq.

Sherrard, German & Kelly

3550 FreeMarkets Center

Pittsburgh, PA 15222

CERTIFICATE OF SERVICE

I, hereby certify that a true and correct copy of the foregoing **Application for Certificate of Appealability** was served this 5th day of November, 2003, by United States Mail, first class mail delivery, postage pre-paid, to the following individuals:

Harry E. Wilson, Superintendent,
State Correctional Institution at Cresson, PA
P.O. Box A
Old Route 22
Cresson, PA 16699-0001

Mike Fisher, Attorney General
Office of Attorney General
c/o Francis R. Filipi,
Senior Deputy Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

United States District Judge
William H. Yohn, Jr.
14613 United States Courthouse
601 Market Street
Philadelphia, PA 19106

United States Magistrate Judge
Charles B. Smith
3006 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Gary F. Dobias, District Attorney
Carbon County Courthouse
P.O. Box 36
Jim Thorpe, PA 18229

/s/ James R. Hankle
James R. Hankle, Esquire

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EDGAR D. MCCLURE, Case No. 03-1638
Appellant

v.

HARRY E. WILSON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON; THE DISTRICT ATTORNEY OF THE COUNTY OF CARBON; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge,
SLOVITER, NYGAARD, ALITO, ROTH, McKEE,
RENDELL, BARRY, AMBRO, FUENTES, SMITH,
and CHERTOFF, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: November 21, 2003
CMD/cc: James R. Hankle, Esq.
David W. Addy, Esq.